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SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT

Oscar S. Gray*

The enactment in 1966 of section 4(f) of the Department of Transportation (DOT) Act\(^1\) represented the first major legislative victory, apart from water resource development programs,\(^2\) in the battle of conservationists for control of public works projects. That section provides for the protection of parks, recreation areas, wildlife and waterfowl refuges and historic sites (referred to below as "protected lands"), as well as for the preservation of the natural beauty of the countryside. Section 4(f) has become increasingly important as a basis for judicial review of administrative decisions in all areas under the jurisdiction of DOT.

Although the courts have begun to provide illumination, a number of key questions remain unanswered as to the meaning of the section and the proper role of the judiciary in reviewing its administration. This article will attempt to articulate some of those questions and to suggest some answers.

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2. In the case of certain water resource development programs, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-66c (1970) has required since 1958 that the agency responsible for the project consult with the United States Fish and Wildlife Service. Id. § 662(a). It provides for recommendations by the Secretary of the Interior regarding measures to mitigate or compensate for damages to wildlife attributable to such projects [Id. § 662(b)]; such measures are to be financed as part of the cost of the projects. Id. § 662(d). With certain exceptions that Act applies:

[w]henever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license . . . .

Id. § 662(a).
I. LEGISLATIVE HISTORY

A. Background of the DOT Act

The Department of Transportation was established in 1967 pursuant to legislation enacted in 1966 which brought a number of separate programs together into a new cabinet-level agency. The purpose of the consolidation was to include in the new department operating and promotional functions in connection with all the transportation modes. The independent administrative agencies, however, were to retain their respective economic regulatory functions relating to those modes. For instance, the formerly independent Federal Aviation Agency was to become DOT’s Federal Aviation Administration (FAA), with the functions of promoting civil aviation and providing for aviation safety and the efficient use of the navigable airspace, whereas the economic regulation of air carriers was to be left with the independent Civil Aviation Board. Similarly the responsibility for development and for safety regulation of railroads was to be assigned to a new Federal Railroad Administration (FRA) in DOT, and the safety regulation of motor carriers to a Bureau of Motor Carrier Safety in DOT’s new Federal Highway Administration (FHWA), while


10. 49 U.S.C. §§ 1655(e), 1655(f)(3) (1970). These functions are subject to the responsibilities of the NTSB [see note 6 supra], and also include responsibility for regulating the safety of certain interstate pipelines. Pipelines which transport water or natural or artificial gas are excepted from this authority. 49 U.S.C. § 1(1)(b) (1970). The Secretary of Transportation was later given authority to regulate the safety of interstate gas pipelines by the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §§ 1671-84 (1970). The Secretary delegated this authority not to FRA, but to the Assistant Secretary for Safety and Consumer Affairs. 49 C.F.R. § 1.58(d) (1972). “Gas” under this act is defined to include “natural gas, flammable gas, or gas which is toxic or corrosive.” 49 U.S.C. § 1671(2) (1970).


the economic regulation of rail and motor carriers was left with the Interstate Commerce Commission. Other organizations transferred to DOT included the Coast Guard, from Treasury; the Bureau of Public Roads (BPR), from Commerce to the new FHWA; and the Saint Lawrence Seaway Development Corporation. Later, the Urban Mass Transportation Administration was also transferred to DOT from the Department of Housing and Urban Development. These programs amount to a total roster of about 98,000 employees, and a total annual budget in the order of $8 billion.

Before their transfer to DOT each of these organizational entities had operated under the authority of separate laws which had been enacted to govern their respective programs. After enactment of the

13. 49 U.S.C. § 1655(f) (1970). There was one anomaly. In the field of merchant shipping, promotional activities are carried out by the Maritime Administration, within the Department of Commerce, and economic regulation by the independent Federal Maritime Commission. See Reorganization Plan No. 7 of 1961 (pts. 1-2), 26 Fed. Reg. 7315 (1961), 46 U.S.C. § 1111 (1970); Reorganization Plan No. 21 of 1950 (pt. 2), 15 Fed. Reg. 3178 (1950), 46 U.S.C. § 1111 (1970). If the legislative pattern established for other modes of transportation had been followed in this area, the Maritime Administration would have been transferred from Commerce to DOT. This had been proposed in the original bill, but was deleted by the House of Representatives, which insisted on its version in conference. See CONFERENCE REPORT TO ACCOMPANY H.R. 15963, H.R. Doc. No. 2236, 89th Cong., 2d Sess. (1966); 112 CONG. REC. 25506 (1966) (remarks of Senator Jackson). Maritime safety functions were not involved in this dispute since they are administered by the Coast Guard [46 U.S.C. §§ 22-39, 361-436 (1970)]. See note 17 infra.

14. 49 U.S.C. § 1655(b) (1970). Various functions of the Secretary of the Army, relating generally to the regulation of obstructions to navigable waters, such as bridges and causeways, were also transferred to DOT [49 U.S.C. § 1655(g) (1970)], and are administered by the Coast Guard in accordance with 49 C.F.R. § 1.46(c) (1972).


17a. The largest in terms of personnel are Coast Guard — nearly 45,000, mostly military — and FAA — over 50,000, mostly air traffic controllers. THE BUDGET OF THE UNITED STATES GOVERNMENT, 1973 — APPENDIX 681-741, 1032-34 (1972). The big money is in the highway program — about $5.5 billion annually. For fiscal year 1971 there was authorized $5.493 billion to be administered by FHWA, of which $5.425 billion was for the federal-aid highway program [see note 19 infra], and $68 million was for other highway programs administered by FHWA, consisting of certain defense highways, forest highways and other roads on public lands. In addition, about $241 million was authorized for federal highway activities to be administered by other agencies the same year, such as national park roads and parkways ($41 million), forest development roads and trails ($170 million), and Indian reservation roads ($30 million). U. S. DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION, FEDERAL LAWS, REGULATIONS AND MATERIAL RELATING TO THE FEDERAL HIGHWAY ADMINISTRATION pt. II, at 90-91 (1970).
DOT Act the earlier authorizing legislation relating to each of these programs remained in force for the most part, and each separate program remained under the jurisdiction of the congressional committee which had traditionally exercised jurisdiction in that area. For instance, FHWA’s federal-aid highway program is governed by Title 23 of the United States Code, and is part of the substantive responsibility of the House and Senate Public Works Committees. The FAA operates under a number of laws, codified for the most part in Title 49, and is generally under the jurisdiction of the House and Senate Commerce Committees. The Coast Guard falls mostly under the Commerce Committee in the Senate, but under the Committee on Merchant Marine and Fisheries in the House.

Because, however, the proposed Department of Transportation Act dealt with an organizational matter, the establishment of a new agency, this bill was handled in the Congress by the Government Operations Committees of the House and Senate. Some members of these committees were relatively new to the specific programs concerned and may have brought with them a degree of independence from some of the established traditions of the operating programs which were to be amalgamated into DOT.¹⁸

Among the most deeply-rooted of these traditions was the philosophy behind the federal-aid highway program. An old program,¹⁹ it

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¹⁸. A prominent member was Senator Henry M. Jackson, who had become deeply involved in conservation issues while serving as Chairman of the Committee on Interior and Insular Affairs. He was the member of the Committee credited with the sponsorship of section 4(f). See note 31 infra and accompanying text.


The federal aid “primary system” consists of “an adequate system of connected main highways;” it is selected “by each State through its State Highway department, subject to the approval of the Secretary . . . .” 23 U.S.C. § 103(b) (1970).

The federal-aid “secondary system” is selected “by the State Highway departments and the appropriate local road officials in cooperation with each other, subject to approval by the Secretary . . . .” It includes “farm-to-market roads, rural mail routes, public school bus routes, local rural roads, country roads, township roads, and roads of the country road class . . . .” provided they are not on another federal-aid system. Federal-aid secondary roads may be located in urban areas, as defined below if, they pass through the urban area or connect with another federal-aid system in the urban area. Id. § 103(c). The term “urban area” means “an area including an adjacent to a municipality or other urban place having a population of five thousand or more.” Id. § 101.

The federal-aid “urban system”, newly authorized at the end of 1970, is to be established “in each urbanized area”, defined in 23 U.S.C. § 101(a) (1970) as “an area so designated by the Bureau of Census.” These routes are to be selected “by the appropriate local officials and the State highway departments in cooperation
was widely understood by its practitioners to represent a federal-state "partnership," with emphasis on the prerogatives of the states, which in practice meant the state highway departments. Although a large part of the project costs have come from the Federal Highway Trust Fund (ninety percent in the case of the Interstate highway program, fifty percent in the case of most other federal-aid highways\textsuperscript{29}), typically these federal contributions were not considered by those veteran Bureau of Public Roads engineers to justify federal interference in decisions such as highway location and, to a considerable degree, detailed design. This view, which reflected the historic outlook of the congressional committees responsible for the program, was based on the notion that federal contributions were really "state" money. Since the apportionment of funds among the states was predetermined in accordance with formulas or other plans approved by Congress, it was reasoned that each state was legally "entitled" to the sums so apportioned. Therefore use of the funds was considered to be within the sole discretion of the state, and the authority of the federal administering agency was thought not to include any discretion as to whether or not funds should be made available.\textsuperscript{21}
B. Environmental Developments in the 1966 Transportation Legislation

Against this background a revolt was brewing in the 90th Congress, stimulated largely by the destructive impact of freeways in urban areas. The Executive, even after "apportionment" to the states, and that the states do not have "any inchoate right to the apportioned funds." 42 Op. Atty' Gen. at 7 (Feb. 25, 1967). In 1968, however, Congress enacted 23 U.S.C. § 101(c) (Supp. IV, 1969), which expressed

... the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation....

The 1968 provision purported to prohibit such impoundment or withholding "by any officer or employee of any department, agency or instrumentality of the executive branch of the Federal Government...." In 1970 this was changed to "... any officer or employee in the executive branch of the Federal Government," presumably to cover more clearly officials in the Executive Office of the President, 23 U.S.C. § 101(c) (1970). Executive impoundment for purposes of federal budgetary control nevertheless continued, amounting to about $1.8 billion by mid-1972. Senate Comm. on Public Works, Report on the Federal-Aid Highway Act of 1972, S. Rep. No. 92-1081, 92d Cong., 2d Sess. 2, 8 (1972). At least one federal district court has held that the Secretary of Transportation may not withhold authority to obligate federal-aid highway apportionments for reasons related to the control of inflation, on the ground that these reasons "are foreign to the standards and purposes of the Act." State Highway Comm. of Missouri v. Volpe, 347 F. Supp. 950, 954 (W.D. Mo. 1972), aff'd ___ F.2d ___ (8th Cir., April 2, 1973).

The federal-aid highway program is funded through unusual mechanisms. Ordinarily the amount which the executive branch may spend (for most purposes other than the highway program) is determined by congressional appropriations. The authority of Congress to enact these appropriation acts is limited by the rule that appropriations must be "authorized." See Rules of the House, Cannon's Precedents of the House of Representatives 383 (1907). This typically means that there must have been a prior "authorizing" act which either imposes a ceiling on the amount which may be appropriated in the appropriations act, or which authorizes the appropriation of such sums as may be necessary for a certain purpose. The executive branch usually has no authority to incur "obligations" until the appropriation is passed, and normally the appropriation may be less than the authorization, although it may not exceed it. The ultimate authority as to what may be obligated is, typically, therefore the appropriations act, which is subject to limitations imposed by the authorizing legislation. In the normal case the authorizing legislation is handled in Congress by the committees having substantive jurisdiction over the subject matter, and the appropriation is handled by the House and Senate Committees on Appropriations.

In the highway program a different concept is used. The Highway Trust Fund [note 195 infra] is "... in effect, a device designed to identify an amount equivalent to certain designated taxes as a ceiling on the sums available for highway construction." 42 Op. Atty' Gen. at 9 (Feb. 25, 1967). The biennial Federal-Aid Highway Acts authorize appropriations for the federal-aid highway programs in designated amounts within the limits corresponding to the Highway Trust Fund. The Secretary of Transportation then "apportions" the amounts authorized to be appropriated on or before the first of January preceding the fiscal year for which they are authorized.
areas. In order to save Brackenridge Park in San Antonio, Senator Ralph Yarborough of Texas had introduced a parkland preservation

23. The Brackenridge — Olmos Basin Parklands are unique park and recreation areas situated at the headwaters of the San Antonio River and surrounded by a densely populated urban area in San Antonio, Texas. The Parklands contain Sunken Gardens, an open air theatre, two golf courses, the San Antonio Zoo, picnic areas, nature trails, and many acres of green open space. It appears that the expressway will require the use of between 116 and 250 acres of parkland. Named Ind. Mem. of San Antonio Con. Soc. v. Texas Hy. Dep't, 446 F.2d 1013, 1020 (5th Cir. 1971). The proposed road, designed to link the San Antonio International Airport with downtown San Antonio, was initially proposed by the Texas Highway Department in the mid-1950's. That department approved the route through the parks in 1963 and persisted in attempting to build it despite the enactment of 23 U.S.C. § 138 (1970) and of section 4(f) of the Department of Transportation Act [49 U.S.C. § 1653(f) (1970)]. Litigation ensued, described in note 149 infra and accompanying text.
amendment to the proposed Federal-Aid Highway Act of 1966. That bill had been proceeding through normal legislative channels under the

... the way we live in America today would be impossible without economically healthy and efficient highway transportation .... Yet at the same time we must recognize that highways can wipe out neighborhoods. Air pollution is a killer. Traffic congestion is tedious — in fact, unhealthy .... Highways can obliterate irreplaceable historical assets. Highways can — and have, in a few sorry cases — been bulldozed through scenic areas.


In an earlier address he had stated:

Our highways have brought great progress, both economic, industrial and by way of safety .... [W]e know that for every five miles of interstate system that we build we save one human life — not just for that year but for every succeeding year .... Yet ... public transit is a vital necessity. Our cities ... cannot depend on the automobile alone. The private automobile has tremendous shortcomings in urban areas ....

Never mind the fact that an automobile is some 20 feet long, weighs 2 tons, and carries, on the average, 1.6 people on each trip. Never mind the fact that the internal combustion engine (depending on whether you listen to its fans or its critics) generates from 50 to 80 percent of all the air pollution we breathe every day. Never mind the fact that the automobile kills 55,000 people every year, over 150 every day.

Never mind the fact that the leading cause of death among our young people, aged 16 to 25, is the highway crash. Never mind the fact that in America today we have one linear mile of highway for every square mile of land, and with the automobile population growing by 10,000 vehicles every 24 hours the demand for additional pavement is enormous.

Over and above all these items, we must accept the fact that there are those in our economy for whom the automobile is far too expensive a purchase.

We must accept the fact that all our proposed social remedies such as model cities projects, health centers, evening college classes, job training centers, suburban employment opportunities, and you name-it, just aren't going to get full utilization if we make automobile ownership an unwritten prerequisite for participation.


24. As introduced the amendment would have provided:

It is hereby declared to be the national policy that in carrying out the provisions of this title maximum effort should be made to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and programs which carry out such policy. After July 1, 1968, the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless (1) there is no feasible alternative to the use of such land, (2) such program includes all possible planning to minimize any harm to such park or site resulting from such use, and (3) where possible and appropriate substitute land will be provided for such park or site. Any additional project costs incurred for the purpose of acquiring any such substitute lands shall be considered to be included in "costs of rights-of-way" for the purpose of this title.

112 CONG. REC. 14074 (1966).
sponsorship of the Public Works Committees at the same time that the Department of Transportation Act was being considered by the Government Operations Committees. The Senate Public Works Committee accepted, and the Senate passed, most of the Yarborough amendment, but it was watered down in one important respect in conference.

As enacted, the Yarborough amendment, codified as 23 U.S.C. § 138, contained three related provisions. First, it "declared . . . the national policy" that the Secretary (then of Commerce, later of Transportation) should use "maximum effort to preserve . . . government parklands and historic sites . . . ." Second, it required him to "cooperate with the States in developing highway plans and programs which carry out such policy." Finally, it provided that the "Secretary shall not approve any . . . [highway] program . . . which requires the use of any land from a Federal, State or local park or historic site, unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use."

For the first time there was an apparent mandate for the federal administrators of the highway program to reject a state program involving a park or historic site, for lack of "all possible planning . . . to minimize harm." One notable change from the Senate bill related to the treatment of "alternatives" to the use of such lands. The original Yarborough amendment would have prohibited the use of such lands in case of the existence of an alternative to such use. As enacted, the question of alternatives was converted to a requirement that the "all possible planning" must have included "consideration" of alternatives by the state highway department. The Conference Report made it clear


26. As passed by the Senate the section provided:
It is hereby declared to be the national policy that in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and program [sic] which carry out such policy. After July 1, 1968, the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless (1) there is no feasible alternative to the use of such land, (2) such program includes all possible planning to minimize any harm to such park or site resulting from such use.


that the change was intentional. Senator Yarborough, nevertheless, was grateful for whatever remained.

Meanwhile the Senate Government Operations Committee included in the new Department of Transportation bill a provision based on the Yarborough amendment to the Federal-Aid Highway bill, as it had been passed by the Senate before dilution in the Conference Committee. The version provided for the DOT bill was further broadened to include additional categories of protected land. These provisions ultimately led to sections 2(b)(2) and 4(f) of the 1966 DOT Act. Section 2(b)(2) "declared . . . the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." Section 4(f), the strongest of the 1966 transportation legislation provisions, provided:

The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

Section 4(f) of the DOT Act survived the Senate-House conference without being watered down in the same manner as was the

29. " . . . [T]he requirement that there be no feasible alternative to the use of the land for highway purposes has been deleted and there has been added the requirement that the planning must include consideration of alternatives to the use of this land for highway purposes." CONFERENCE REPORT, supra note 27, at 11-12.


31. These provisions were introduced in S. 3010, 112 CONG. REC. 24202 (1966), and were discussed in the accompanying SENATE COMM. ON GOVERNMENT OPERATIONS, REPORT ON ESTABLISHING A DEPARTMENT OF TRANSPORTATION, S. REP. NO. 1659, 89th Cong., 2d Sess. 5-6 (1966). According to Senator Magnuson of Washington, Senator Jackson sponsored these provisions in committee. 112 CONG. REC. 26365 (1966).


34. Id. The words "and prudent" were added by the Senate-House Conference Committee. CONFERENCE REPORT, supra note 27, at 25.
Yarborough amendment to the Federal-Aid Highway Act. This was apparently due to the difference in committee personnel; the conferees on the DOT Act represented the Government Operations Committees of the two houses, rather than the Public Works Committees. In part it was the result of an interesting legislative compromise. The Senate

35. During the House debate on the Conference Report an effort was made by two congressmen who were not members of the Conference Committee (nor, indeed, of the House Committee on Government Operations, which was responsible for the bill) to construe section 4(f) in terms not otherwise provided in its text or legislative history. Congressman Kluczynski, a member of the Public Works Committee, stated:

Mr. Speaker, I am pleased to see section 4(f) appear in this bill . . . but I would like to sound a word of caution in interpreting section 4(f). There is no question in my mind that the protection of our parks, open spaces, historic sites, fish and game habitats, and the other natural resources with which our Nation is so richly endowed, is of the utmost importance and urgency, but not to the total exclusion of other considerations. To do so would result in as many inequities as justifying transportation plans merely on the basis of economy or efficiency. Other considerations would include the integrity of neighborhoods, the displacement of people and businesses, and the protection of schools, and churches and the myriad of other social and human values we find in our communities. Attempting to define "feasible alternative" in light of all of these considerations is virtually impossible and may result in hampering and otherwise unnecessarily delaying transportation progress. The problem was resolved in the 1966 Highway Act by rephrasing the requirement to read, "unless such program includes all possible planning, including consideration of alternatives." I am glad to see the words "and prudent" added to this section by the conference committee. With this inclusion, and with "prudent" as the operable word, this section now becomes workable and effective and I fully support and intend to vote for the bill as written.

112 CONG. REC. 26651 (1966).

Congressman Rostenkowski, a member of the Banking and Currency Committee, made the following contribution on section 4(f):

This is a good amendment . . . However, I would like to recall for my colleagues the concern that was voiced when the Highway Act was pending. Fear was expressed that the amendment might be misinterpreted to mean the preservation of natural and man-made resources would be the overriding consideration in highway construction. It was made clear at the time that as desirable as parkland preservation might be, other important factors must be considered . . . .

I will support section 4(f) on the basis that it is the clear intent of the Congress to establish only guidelines for the approval by the Secretary . . . .

I heartily endorse the guidelines. I also want the Record to show, however, that it is not the intent of the Congress to tie the Secretary's hands . . . . I can easily foresee circumstances when it may be vital to use such land.

For instance, if it became necessary to choose between preserving a wildlife refuge or saving human lives by a highway improvement. I do not think any of us would have any doubt as to which choice should be made. Or, if there were a choice between using public parkland or displacing hundreds of families, with the attendant burden imposed on them, I would want the Secretary to weigh his decision carefully, and not feel he was forced by the provision of the bill to disrupt the lives of hundreds of human beings . . . .

bill would have transferred the Maritime Administration to DOT. The House bill did not provide for this transfer. The House was adamant on the Maritime Administration, and the Senate conferees, forced to yield on this point, may have been thereby aided in preserving the Senate version on other differences in the bills.

C. The 1968 Legislation

It rapidly became apparent that there might be a number of urban highway controversies in which Section 4(f) of the 1966 DOT Act could be invoked in administrative appeals to Washington, and possibly also in litigation. Particularly troublesome to the roadbuilders was the prospect of being second-guessed on the “feasible and prudent alternatives” issue. To demonstrate that thought had been given to alternatives before a route had been selected, an arguably sufficient showing under the Yarborough amendment to the federal-aid highway legislation, section 138, would be one thing, but to prove that there were in fact no feasible and prudent alternatives, as section 4(f) seemed to require, would be quite another. Similarly, the Title 23 provision seemed to leave the decision among alternatives to the state highway department, provided “consideration” had been given to the alternatives, whereas the language of section 4(f) seemed to suggest that this decision was to be reviewed by the federal government.

Accordingly, a strong attempt was made in 1968 to trim section 4(f) back to the scope of section 138. The vehicle for this attempt was the bi-annual highway authorization bill, which was to become the Federal-Aid Highway Act of 1968, and which was handled by the House and Senate Public Works Committees. The attack was led by the House committee. The announced theory of the attack was that the differences between sections 4(f) and 138 were confusing, and that they should therefore be harmonized. The method proposed was

36. “In view of the House mandate if the maritime [sic] remained in the bill, the conference report would be rejected in the House and there would be no Department of Transportation during this Congress. Our task became the ‘art of the possible.’” 112 Cong. Rec. 26564 (1966) (remarks of Senator Jackson, a conferee, in the Senate debate on the conference report).

37. This is reflected by the House Comm. on Public Works, Report to Accompany H.R. 17134, Federal-Aid Highway Act of 1968, H.R. Rep. No. 1584, 90th Cong., 2d Sess. (1968), which stated:

The difference in language between section 138 of title 23 and the comparable provisions of section 4(f) of the Department of Transportation Act is slight. Both are concerned with criteria for highway planning in relation to the enumerated land uses, however, and it is the committee’s opinion that the language of section 138, title 23 . . . should be controlling . . . .

Neither section 138 nor section 4(f) stands alone as the beacon lighting the way to wisdom in the administration of our resources. Both are intended to
to change section 4(f) to read more like section 138.\textsuperscript{38}

Conservationists all over the country were aroused\textsuperscript{39} by this provision as well as by other aspects of the legislation.\textsuperscript{40} Leadership for the defense of section 4(f) centered in the Senate Public Works Committee. Out of conference came a compromise version, which on its face was a victory in most respects for the conservationists, with a peculiar legislative history. Both section 4(f) of the DOT Act and

 broaden, not narrow, the perspective in decision making. Parklands and historic sites . . . have very real value . . . . No rational person would suggest, however, that that value is the only one to be considered in a judgment as to the best public interest. In weighing alternatives for highway location, equal consideration must be given to other factors — to whether people will be displaced; to whether existing communities will be disrupted; to whether the established demand for adequate transportation . . . will be met; and to the preferences of the people of the area involved. Preservation for use is sound conservation philosophy, and it is in that perspective that both section 138 and section 4(f) should be administered.

*Id.* 12 (emphasis added).

This approach contrasts sharply with the Supreme Court's rationale in construing section 4(f) in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). See note 96 *infra* and accompanying text. It was, however, considered authoritative by FHWA engineers until the Supreme Court's decision.

38. Section 17 of the bill as reported by the House Committee would have deleted everything in section 4(f) \textsuperscript{(see text accompanying note 34 *supra*)} after "unless," through "minimize," and would have substituted; " . . . such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any . . . ." \textit{House Comm. on Public Works, Report to Accompany H.R. 17134, Federal-Aid Highway Act of 1968, H.R. Rep. No. 1584, 90th Cong., 2d Sess. (1968).}


The amendment . . . would abandon the standard that there must be no feasible and prudent alternative before the transportation program or project can be approved for construction through a park, recreation area, wildlife or waterfowl refuge or historic site. Instead, the Committee's amendment would permit any freeway, airport, railroad line, or any other type of transportation facility to be constructed through such areas of . . . natural importance simply on the basis that an engineer has given "consideration of alternatives." What does it mean when an engineer states that he has "considered" an alternative? It could mean he has given all of 5 minutes thought to an alternative but remains firmly convinced that the route through a park is best because it is the straightest line or requires the least land acquisition costs. Such attitudes have been advanced in some cities, such as New Orleans, San Francisco, Washington — and such attitudes have helped magnify the opposition to urban freeway construction. . . .

*Id.* 63-64.

section 138 were amended so as to be identical to each other. The new common provision is set out below; the significant changes from the 1966 version of section 4(f) are shown in italics:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.\footnote{41. 49 U.S.C. § 1653(f) (1970).}

Three changes are evident. First, a new “special effort” first sentence was added. This was, however, a verbatim reproduction of the existing section 2(b)(2) of the Department of Transportation Act, and was substantially similar to the previous first sentence of section 138 which called for a “maximum effort” to preserve parklands and historic sites. Second, a new requirement was added to the final sentence of Section 4(f) that the parks, recreation areas and wildlife and waterfowl refuges — but not historic sites — covered by that sentence be “publicly owned.” No similar requirement, however, was imposed with respect to the protection accorded the same categories of land under the first sentence of that section (relating to the national policy that a “special effort” be made to preserve such lands). Third, a further requirement was added to the last sentence of section 4(f), but not to the first sentence of section 4(f), that the protected lands be “of national, state or local significance as determined by the Federal, State or local officials having jurisdiction thereof.”

These changes are susceptible to a reasonably straightforward integration. A special effort should be made to preserve protected
lands. In addition, if they are publicly owned and are officially considered significant, more than a special effort is required. In such case the use of protected land is illegal unless two conditions are met: first, that there is no "feasible and prudent alternative"; and, in such case, that there has been in addition "all possible planning to minimize harm."

The waters were somewhat muddied, however, by a "Statement of the Managers on the Part of the House" which was attached to the House print of the Conference Report and signed by the House conferees but not by the Senate conferees. This "Statement" declared:

This amendment of both relevant sections of law is intended to make it unmistakably clear that neither section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority. They further developed the record


43. Mr. Cooper. . . . I invite the attention of the Senator from West Virginia to the interpretation given in the report of the managers on the part of the House. I believe it is wrong, and is contrary to our discussions in the conference. But most important — and I believe this in an interpretation that will hold — it is contrary to the language of the section. There is nothing concerning discretion of the Secretary in the section itself.

I recall no discussion in the conference of any such intent. Furthermore, the language of the section gives no discretion. If a local official, a State official, or a Federal official having jurisdiction finds one of these areas or sites to be of significance, there is no discretion given to the Secretary of Transportation to permit its use for a highway. Will the Senator agree with me on that?

Mr. Randolph. I agree with what the distinguished Senator from Kentucky has said in referring to the language of the House managers on page 32 of the conference report. That, I say with due deference to the House, is the interpretation of the House. It is not our interpretation. I agree with the Senator from Kentucky. This is not as we believe it.

Mr. Cooper. The legislative language, if it is clear on its face, of course must be interpreted that way. The language prohibits any intrusion upon or invasion of these lands or areas if one of these bodies finds it is of National,
at some length to the effect that even if local authorities declare protected land to be not significant and request a road through such land, the Secretary has the discretion to refuse approval in order to preserve parks and other protected lands.44

Notwithstanding the House Managers' "Statement," it would appear clear from the language of the section that there is indeed a "mandatory prohibition against the use of the enumerated lands" if they have properly determined "significance" and if there is a "feasible and prudent alternative," or, even if there is no such alternative, if the project does not include "all possible planning to minimize harm." It would have been difficult to reconcile a contrary view with the language of the statute even if the Senate conferees had agreed with the construction reflected in the House Managers' "Statement." In view of the Senators' explicit disagreement with such an interpretation, it cannot plausibly be argued from legislative history that the Congress, as a whole, intended a construction inconsistent with the clear wording of section 4(f).45

State or local significance, and the highway cannot be built, unless there is no feasible and prudent alternative to doing so.

Mr. Randolph. I agree with the Senator.

114 Cong. Rec. 24033 (1968).

44. Id.

45. This view is supported, inter alia, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), cert. denied, Fugate v. Arlington Coalition on Transp., 409 U.S. 1000 (1972); Named Ind. Mem. of San Antonio Con. Soc'y v. Texas Hy. Dep't, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 400 U.S. 968 (1972); and in an opinion in the Three Sisters Bridge case, District of Columbia Fed'n of Civic Ass'n's v. Volpe, 434 F.2d 436 (D.C. Cir. 1970). In Three Sisters the question arose whether section 23 of the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 23, 82 Stat. 827, which, as ultimately negotiated in conference, required the construction of the bridge "as soon as possible in accordance with all applicable provisions of title 23 of the United States Code," required compliance with environmental protection provisions such as sections 128 and 138 of title 23, or with the Federal Highway Administration's procedural requirement for environmental protection, FHWA Policy and Procedure Memorandum 20–8 (Jan. 29, 1969), 23 C.F.R. App. A (1972) [hereinafter cited as PPM 20–8]. Again there were unilateral interpretations in the same Statement of the Managers on the Part of the House [see text accompanying note 42 supra], with which the Senate conferees apparently did not concur. The majority opinion, by Judge Wright, stated, "The Conference Report contains no analysis of the bill as passed." 434 F.2d at 444. "The 'Statement of the Managers . . . .' was only appended to the Conference Report . . . . It did not represent the will of the Senate conferees and can only be said to represent the personal opinions of those who signed it." Id. at 444 n.38. In a concurring opinion Chief Judge Bazelon, who found the statutory language ambiguous, stated that the "Statement of the House Managers is of course entitled to respect in determining the legislative intent." Id. at 448. "It is not, however, entitled to the weight of a conference report, since it [is] not signed by a majority of the Senate conferees." Id. at 448, n.4. The Statement "cannot . . . supply the specificity necessary to make fine distinctions
II. Administrative Practice

The Secretary's authority under section 4(f) has never been delegated to the operating administrations, with one partial exception in

since no basis for those distinctions can be found in the language chosen by the legislative conferees." Id. at 448. The Bazelon opinion cites as precedent a 1935 ruling by the Speaker of the House. [79 CONG. REC. 12237-39 (1935)].

In Overton Park the Court considered, inter alia, the contention that the decision of the Secretary to approve a road through a Memphis park, in accordance with the preference of the local authorities that the road be located in the park rather than elsewhere, was not subject to judicial review because, under 5 U.S.C. § 701(a)(2) (1970), this approval constituted "agency action . . . committed to agency discretion by law." The Court rejected the contention with this explanation: "... [T]he Secretary's decision here does not fall within the exception for action 'committed to agency discretion . . .'. Section 4(f) . . . and § 138 . . . are clear and specific directives . . . This language is a plain and explicit bar to the use of federal funds for construction of highways through parks — only the most unusual situations are exempted." 401 U.S. at 410-11.

While the Court in Overton Park did not expressly discuss the Statement of the Managers on the part of the House, the defendants' position on agency "discretion" was clearly based upon the "discretionary authority" language in that Statement. The Supreme Court, moreover, overruled a district court opinion which had specifically relied on the House Managers' Statement. Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F. Supp. 1189, 1195 (W.D. Tenn. 1970).

The Fifth Circuit, in San Antonio, also did not address itself explicitly to the Statement. It was faced, however, with a City Council resolution that certain right-of-way lands in a park "are of primary local significance as part of the right-of-way for the North Expressway and of secondary local significance as parts of park and recreation areas." 446 F.2d at 1025-26. The court rejected the highway department's argument that this constituted a finding of "no local significance." Instead, the Fifth Circuit stated:

[the resolution] says that Brackenridge Park is of local significance as a Park, but that the City Council would prefer to see it used for a highway. The question, therefore, is whether Congress intended to leave the choice between parks of local significance and federal-aid highways to local authorities; or whether Congress, in passing section 4(f), has already made the choice between the two uses. Only one construction fairly can be given to section 4(f), and that is that

46. From its inception the Department of Transportation has operated under a pattern of formal delegations and retentions of the authorities vested in the Secretary by the DOT Act. These administrative arrangements are formalized in departmental orders which are codified in Title 49, Code of Federal Regulations. See 49 C.F.R. §§ 1.43(a), 1.44(a) (1)-(2) (1972), which state, in substance, that all powers not delegated by the Secretary in 49 C.F.R. §§ 1.43-65 (1972) are reserved to the Secretary. Section 1.44(a) (2) further specifically provides that the delegations of authority in 49 C.F.R. §§ 1.45-51 (1972) (which concern delegations outside of the Office of the Secretary):

[D]o not extend to the following actions, authority for which is reserved to the Secretary or his delegatee within the Office of the Secretary:

(2) Authority relating to transportation activities, plans, and programs under section 4(f) and (g) of the Department of Transportation Act (49 U.S.C. 1653(f) and (g)), except for regulatory matters implementing section 4(f) for programs administered by the Federal Aviation Administration.

49 C.F.R. § 1.44(a) (2) (1972) (emphasis added).
the case of the FAA.\textsuperscript{47} During the Johnson Administration, under Secretary Alan S. Boyd, it was intended within the Office of the Secretary of Transportation that the section 4(f) functions would ultimately be delegated, to be carried out in accordance with two pro-

Congress itself had made the choice between the two uses. Clearly, Congress did not intend to leave the decision whether federal funds would be used to build highways through parks of local significance up to the city councils across the nation. If there was any doubt about this question before Overton Park, there most assuredly is no longer any doubt . . . .

The Record in this case reveals that the state defendants relied heavily on . . . [the Overton Park] district court opinion . . . . Now, of course, that argument is foreclosed by the Supreme Court’s decision in reversing the district court in Overton Park. We must conclude from the Supreme Court’s action that the Court attached little if any significance to the local officials’ preference to use Overton Park for highway right-of-way.

\textit{Id.} at 1026-27.

Similarly, the Fourth Circuit, in \textit{Arlington Coalition}, stated:

In the ‘significance’ determination envisioned by Sections 138 and 4(f), the desirability of using the particular parkland in question as a highway must be ignored and only the value of the park as a park can be considered . . . . Were this not so, land valuable to the community as a park could be used for a highway even though ‘feasible and prudent alternatives’ existed because federal or state officials had decided that using the park for highway purposes was desirable according to criteria other than whether such alternatives existed, the only criterion allowed by the Acts.

458 F.2d at 1336.

The Third Circuit, on the other hand, has employed loose language in describing the disputed paragraph from the House Managers’ Statement as part of the “conference report on the bill.” Pennsylvania Environmental Council v. Bartlett, 454 F.2d 613, 621 (3d Cir. 1971). Nevertheless, this court also rejected the “discretionary authority” concept. Citing \textit{San Antonio}, the court stated, “This is not to say that assuming the area is parkland the Secretary may rely upon a local preference as to its use.” \textit{Id.} at 622 n.10.

For a contrary point of view, see \textit{The Supreme Court, 1970 Term}, 85 HARV. L. REV. 3, 323-24 (1971), which asserts that the Court:

\textit{[G]ave preponderant weight to the environmentalist policy expressed in the statutes despite statutory language and legislative history suggesting that Congress intended to give both the Secretary and local officials broader discretion to balance competing factors. Justice Marshall ignored the requirement that the affected park must be . . . of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof . . . . This language suggests that local officials must initially decide whether municipal parklands should be taken for highway construction.}

While this \textit{Harvard Law Review} position accurately reflects the pre-\textit{Overton Park} interpretation of section 4(f) by FHWA engineers, there is no explanation as to how the statutory language can be reconciled with the conclusion presented. Reference is made instead to a Senate report on a bill which did not contain the “significance” requirement. This report, however, did include one general statement, not necessarily inconsistent with the \textit{Overton Park} position on “significance,” that “the use of parklands \textit{properly protected} and with damage minimized by \textit{the most sophisticated construction techniques} is to be preferred to the move-

\textsuperscript{47} See 49 C.F.R. §§ 1.43(a), 1.44(a)(2), 1.48(b)(1) (1972).
cedural limitations. The first would have been the promulgation by each operating administration of a regulation describing how it would carry out section 4(f). These regulations would have included legal interpretations of the section in accordance with the views of the Department's General Counsel's Office. Another control was also contemplated, in the form of an instruction from the Secretary to each administrator that decisions in the course of administering the regulation should be "coordinated" with the Office of the Secretary.\footnote{48}

In furtherance of this plan, Notices of Proposed Rulemaking were prepared by the Coast Guard\footnote{49} and the FAA\footnote{50} in 1968. In addition, the Secretary delegated to the FAA the authority to promulgate section 4(f) regulations;\footnote{51} he also instructed the Federal Aviation Administrator to coordinate with the Office of the Secretary.\footnote{52}

This process of regulation, promulgation, and subsequent delegation of authority was interrupted, however, by two developments.

\footnote{48. This paragraph, and other statements in this article not otherwise referenced, are based on my recollections from the period 1968-70 during which I directed the Office of Environmental Impact and successor organizational units in the Office of the Secretary of Transportation. The policy as to future delegation of section 4(f) functions had been determined before my appointment.}

\footnote{49. The Coast Guard draft Notice of Proposed Rulemaking was never published in the Federal Register.}

\footnote{50. 33 Fed. Reg. 7041 (1968).}

\footnote{51. 49 C.F.R. §§ 1.44(a) (2), 1.47(h) (1972).}

\footnote{52. Memorandum from Secretary of Transportation Alan S. Boyd to the Federal Aviation Administrator, May 3, 1968.}
One was the enactment of the Federal-Aid Highway Act of 1968, which amended section 4(f) and rendered obsolete the Notices of Proposed Rulemaking previously prepared by the Coast Guard and the FAA. The other was an impasse between the staff of the Office of the Secretary (OST) and the Federal Highway Administration over the extent to which the FHWA's directives to federal highway personnel and to the state highway departments should be issued in the form of "regulations," as distinguished from being handled in the same manner as the operational matters normally decided within the operating administration. This led to the frustration of plans to proceed with the delegation of authority to FHWA. Because of FHWA's opposition a decision appeared unlikely on the adoption of this plan as an overall DOT procedure. There was accordingly no follow-up on the Coast Guard and FAA Notices of Proposed Rulemaking which had been drafted in light of the 1966 version of section 4(f).

Therefore, at the time the Nixon Administration took office, the administration of section 4(f) was in limbo; the section 4(f) authority had not been delegated to the operating administrations of DOT. There was no procedure for referring routine questions under section 4(f) from the operating administrations to the Secretary or his staff. Major issues of sufficient political interest between the Secretary and the Federal Highway Administrator may have been resolved through personal discussions. Decisions on less important matters were made, if at all, within the FHWA, notwithstanding the absence of a delegation of the authority to do so.

Shortly after taking office in 1969 the new Secretary, John A. Volpe, reorganized the Department by establishing the Office of Assistant Secretary for Urban Systems and Environment (soon afterwards changed to Environment and Urban Systems). He issued a directive that all matters in the Department which might involve section 4(f) "must be coordinated" with the new office. Revisions of departmental regulations made it even more explicit that the functions under both section 4(f) and section 138 were reserved to the Secretary.

53. 49 C.F.R. §§ 1.23(d), 1.24(c) (1972).
54. Memorandum from Secretary of Transportation John A. Volpe to Assistant Secretaries, General Counsel, and all Administrators, April 25, 1969, reiterated in Memorandum from the Secretary (signed by Acting Secretary James M. Beggs) to all Administrators and Assistant Secretaries, July 3, 1969.
55. See note 46 supra. A further reorganization of DOT, possibly coming full circle, was announced in 1973 shortly after Secretary Volpe was succeeded by Claude S. Brinegar. The Office of the Assistant Secretary for Environment and Urban Systems was abolished and its environmental functions were transferred to a new office, that of the Assistant Secretary for Environment, Safety and Consumer Affairs.
In late 1969 or early 1970, therefore, the practice developed of processing for the Secretary's signature formal findings and determinations in all section 4(f) cases. As this process was instituted it became apparent that there were a number of apparently non-controversial projects for the use of parklands which had been processed to an advanced stage without consultation with the Secretary or the staff of his Office. In these cases the state highway departments had been permitted to proceed to the point where they were either about to advertise for construction bids or had already done so. The circumstances were typically such that the Secretary could, and did in fact, decide, when he was ultimately consulted, that there were no feasible and prudent alternatives, and that all possible planning had been included to minimize harm. It was evident, however, that before these projects were held up in late 1969 or early 1970 in order to obtain the Secretary's approval, the decisions to build had already been made, either by the state highway department without consultation with BPR, or by BPR without consultation with the Secretary.

If these cases reflect the practices which had prevailed in the field between the enactment of section 4(f) in 1966 and the initiation by FHWA in late 1969 of the routine reference of section 4(f) decisions to the Secretary, there may have been many approvals of projects to use protected lands which were made by persons other than the Secretary or his delegate.

III. PROBLEMS OF INTERPRETATION

A number of legal and policy problems have arisen which require an interpretation of section 4(f). These problems have been compounded by the aforementioned procedural issues concerning jurisdictional authority within DOT. They have also been affected by policy questions regarding federal-state and federal interdepartmental relations, as well as by the differing traditions of the various programs affected by section 4(f).

The Department's order further stated, "In separate documentation authority for making 4(f) [sic] ... environmental determinations is being delegated to the operating administrations." DOT Notice N 1100.37 (Feb. 5, 1973).

56. Examples of three such cases, relating to roads in Morgan City, Louisiana; Ventura County, California; and Berea, Ohio are set out in O. Gray, Cases and Materials on Environmental Law 905–11 (1970). See also Morningside-Lenox Park Assoc. v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971), for an example of typical planning for the use of parkland. In this case, despite numerous prior field-level approvals, FHWA did not advise the state of the need for the Secretary's approval under section 4(f) until January 30, 1970. 334 F. Supp. at 136.
A. To What Activities Within DOT Does This Section Apply?

Under the first sentence of section 4(f), the national policy that a "special effort" be made to preserve protected lands evidently applies to all activities within DOT. As indicated above, the DOT programs affected include, inter alia: the federal aid highway program; the activities of the FAA, including both grants to aid airport construction and the allocation of the navigable airspace; all Coast Guard functions, including the approval of bridges and causeways over navigable waters; the Urban Mass Transportation Program; the Federal Railroad Administration; and the St. Lawrence Seaway Development Corporation.

It is clear that in all these areas of DOT operation the Secretary of Transportation should, under the first sentence of section 4(f), make a "special effort" to preserve protected lands. Of considerable interest to conservationist litigants is the question whether, under the last sentence of section 4(f), he is legally prohibited from approving the use of such lands in connection with the same range of activities absent a "feasible and prudent alternative" and "all possible planning to minimize harm."

The last sentence of section 4(f), the "... shall not approve ..." provision, states that it applies to the approval of "any program or project." This phrase echoes with a difference the original language of section 138, which had required in 1966 that "the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a ... park or historic site . . . ." Within the federal-aid highway program, which generates most section 4(f) questions, the terms "program" and "project" could be
interpreted for section 4(f) purposes to have the same meaning as the same terms had in section 138, that is, to refer to certain terms of art in Title 23 of the U.S. Code which were familiar to the highway program. This would be satisfactory in one sense, in that all federal-aid highway activities would ultimately be covered, sooner or later. The Title 23 “program approval” or “project approval” may not, however, always be an entirely appropriate stage in the decision-making process at which to inject section 4(f) considerations, in that the occasion for such Title 23 approvals may occur after the corridor-selection damage has already been done.

It is evident, however, that section 4(f) is meant to cover all operations within DOT, and not just the highway program. Such other activities have their own authorizing legislation which include planning and operational procedures essentially unique to each program. The procedures applicable to the non-highway programs in DOT have no similarity to the complex legislative structure erected in Title 23 to cover the federal-aid highway program. Accordingly the terms “program” and “project,” as applicable at least to the non-highway operations, can hardly have been intended to refer to Title 23 terms of art, since Title 23 applies only to the highway program, and not to other DOT activities. Moreover, if “program” and “project” mean something other than these terms of art with respect to the non-highway operations, they may very well mean that same something else with respect to the highway program itself for purposes of section 4(f).

1. Applicability of the “. . . shall not approve . . .” Sentence to Non-FHWA Approvals

Apart from the highway program, the issues which have arisen within DOT as to the applicability of the last sentence of section 4(f) have turned more on whether a “use” of protected land is the likely consequence of an “approval,” than on fine distinctions as to the meaning of “program or project.”

If any kind of approval within the Department’s jurisdiction would lead to the “use” of protected land, various institutional forces within the Department would tend to influence the treatment of the issue as a section 4(f) question. As a matter of internal organization, final decisions under section 4(f) involve both the staff of the Office of

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60. “Project” is defined for highway purposes in 23 U.S.C. § 101(a) (1970) as “an undertaking to construct a particular portion of highway, or if the context so implies, the particular portion of a highway so constructed.” “Programs” and “projects” are further treated in 23 U.S.C. §§ 105-06 (1970).
the Secretary\textsuperscript{61} and that of the concerned operating administration whereas non-section 4(f) processing is ordinarily handled solely by the operating administration.\textsuperscript{62} The Office of the Secretary of Transportation (OST) staff elements principally responsible for section 4(f) work are in the offices of an Assistant Secretary (formerly designated TEU, now TES) and of the General Counsel (TGC). Because of the public interest in environmental problems, the appropriateness of such OST involvement is increasingly conceded (at least by the operating administrations other than FHWA) wherever protected lands may be affected in any way.

The Goleta Slough case provides an example of two such non-highway borderline "program or project" questions, involving the Coast Guard and potentially the FAA. The California Division of Highways planned to build a freeway from the vicinity of Goleta, near Santa Barbara, to the University of California at Santa Barbara. The road would have crossed a shallow, marsh-like channel, the Goleta Slough, located largely on the grounds of the Santa Barbara Municipal Airport. Conservationists objected on a number of grounds, including the importance of the Slough for wildlife.

Federal funds were not requested for the road. The Department of Transportation became involved in the controversy because of questions as to two non-financial approvals. First, because of relatively higher elevation to the west of the Slough, a bridge crossing was planned; if the Slough were considered "navigable," such a bridge would require a Coast Guard "permit" under 33 U.S.C. § 401.\textsuperscript{63} Secondly, the land had been deeded by the federal government to the airport subject to the restriction that it be used solely for airport purposes, but the FAA could grant a release from this restriction for uses consistent with the property's suitability for airport use.

The Coast Guard bridge permit was denied in 1970. It was announced\textsuperscript{64} that the Slough was considered navigable, that there was

\begin{itemize}
  \item \textsuperscript{61} See note 55 \textit{supra} and accompanying text; DOT Order No. 5610.1 (Oct. 1, 1970).
  \item \textsuperscript{63} The function of approving such bridges was transferred from the Secretary of the Army to the Secretary of Transportation by section 6(g) (6)(A) of the DOT Act [49 U.S.C. § 1655(g)(6)(A) (1970)], and were delegated by the Secretary to the Commandant of the Coast Guard. 49 C.F.R. § 1.46(c)(8) (1972).
  \item \textsuperscript{64} Letter from John A. Volpe, Secretary of Transportation to Mr. J.A. Legarra, California State Highway Engineer, April 16, 1970, reproduced with comments in O. Gray, \textit{Cases and Materials on Environmental Law} 911-13 (1970).
\end{itemize}
no objection to the bridge for reasons of navigation, but that approval would be withheld because of section 4(f) of the DOT Act. The denial was predicated on the absence of a showing that there was no feasible and prudent alternative to the proposed road. The Coast Guard treated the Slough as a *de facto* wildlife preserve and recreational area, although it was not formally designated as such. There was some ambiguity in the DOT announcement as to which sentence of section 4(f) was being invoked, but it appears that the third ("... shall not approve any program or project...") sentence was conceived to be the basis for the action. The bridge itself would not have directly used land from the Slough; the physical construction which would have required such "use" was the road to which the bridge would have led. The approval which was considered forbidden by section 4(f) was clearly not the conventional Title 23 "project approval" of the road project since there was no federal-aid highway project to be approved under Title 23; it was instead the Coast Guard bridge permit. The prohibited action, therefore, was necessarily viewed in non-Title 23 terms.

A number of variations can be imagined as to the definition of the "project," or the "program," or the concept of approval for section 4(f) purposes. In fact, however, no attempt was made to specify a choice among such alternatives. Instead the case was treated as if section 4(f) applied to any decision within DOT which might make the difference as to whether protected lands would be subjected to "use" other than uses for the purposes for which they are protected.

A close question would have arisen if it had been necessary to decide whether an FAA release of a restriction in the airport's deed would be required in order for the road project to proceed, and, if so, whether the granting of such a release would constitute approval of a "program or project" for section 4(f) purposes. There was no need for a final ruling on these questions. Apparently, however, the Secretary of Transportation had considered in 1968 that the decision as to such a release would be subject to section 4(f). In light of intervening events it would seem unlikely that the FAA would have attempted to make such a decision in 1970 without consultation with OST and the Secretary in the manner of a section 4(f) case.

2. Implications of the "... shall not approve..." Sentence for FHWA Approvals

For the FHWA as well as the Coast Guard and the FAA, it would appear that the non-delegated section 4(f) function, particularly

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65. *Letter from Alan S. Boyd, Secretary of Transportation, to Mr. Frederick Eissler, Conservation Chairman, Los Padres Chapter, Sierra Club, Aug. 21, 1968.*
under the third ("... shall not approve ...") sentence, is a general responsibility to assure that operating decisions which, in the absence of section 4(f), would normally have been made within one of these operating administrations are reviewed instead by the Secretary under section 4(f) if the result would be determinative as to the potential "use" of protected lands. This would require a section 4(f) review of meaningful operating decisions before the time of the Title 23 "program" or "project" approval of the construction within the protected land.

The meaningful highway decision for section 4(f) purposes may be made upon the approval of a general corridor which will in any way ultimately involve the use of protected land. Such a decision can also be made when, within a previously approved corridor, approval is granted to a specific project which, if constructed, would diminish the feasibility of subsequent routing of other projects so as to avoid protected land.

The relevance of these decisions to section 4(f) is obscured if the "program or project" concepts in section 4(f) are thought of solely in Title 23 terms. Often the decision which ultimately turns out to have been determinative is labelled as something different from a "program" or "project" approval. For instance, in FHWA's administrative parlance it may be called an "engineering" approval. Yet the purposes of section 4(f) would clearly be frustrated if by means of such "engineering" approvals a plan were approved for the construction of a highway to opposite sides of a significant park, without reference to the requirements of section 4(f). In such a case it would hardly be persuasive to argue that section 4(f) is not applicable because no Title 23 "program" or "project" approvals had been given for a construction contract through the park itself. The process would be reduced to an absurdity in such a case regardless of how the connecting link were subsequently proposed to be completed. If the link through the park were to be financed as a federal-aid highway, an alternative might no longer be "feasible" or "prudent" after construction was completed on both sides of the park, despite the fact that an alternative corridor to avoid the park entirely might have been found feasible and prudent had the section 4(f) conditions been applied before the approval of the flanking projects. 66 If federal funds were withheld from the connecting

66 Two contrary points of view appear in the decisions as to whether an administrator who must decide whether to approve, reject or alter a proposed public works undertaking may take into account previous investments in that undertaking. The position that he should take previous investments into account is reflected most clearly in a line of cases under the National Environmental Policy Act of 1969 (NEPA) § 102(2)(C)(2), 42 U.S.C. § 4332(2)(C) (1970), which requires that
link, so that it would instead be financed solely as a state project, the parkland would still have been used without compliance with the section 4(f) requirements as a result of DOT's approval of the overall plan for a corridor requiring such parkland use. The same conclusion

environmental impact statements be filed in connection with certain projects. E.g., Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1332 (4th Cir.), cert. denied, Fugate v. Arlington Coalition on Transp., 409 U.S. 1000 (1972); Morning-side-Lennox Park Assoc. v. Volpe, 334 F. Supp. 132, 145 (N.D. Ga. 1971). Yet in section 4(f) cases, the tendency is not to approve illegal routes just because an investment has already been made. In Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873 (W.D. Tenn. 1972), the court stated:

We further ruled, at... pre-trial conference, that defendants would not be entitled to show the amount of money that would, so to speak, go down the drain with an abandonment of the route through the park. We so ruled because it was dramatically clear at the time of the Secretary’s determination in November, 1969 and at the time of the presentation of this case in the Supreme Court that condemnation and removal of buildings was almost complete on the park route and yet the opinion of the Court... omits this as a proper factor for consideration...

335 F. Supp. at 877.

The district court similarly ruled that the Secretary, in “weighing the community disruption factor” relevant to the determination whether an alternative might be “feasible and prudent” [see notes 33-34 supra and accompanying text] could not “consider the fact that the disruption on the park route had already occurred while disruption on another route would be new and additional.” Id. Accord, Arizona Wildlife Fed’n v. Volpe, 4 ERC 1637, 1639 (D. Ariz. 1972) where the court stated: “In considering the relief requested, the fact that this is the mid-segment of a new highway, the two ends of which have been completed, is without significance in this proceeding.” A possible reason for the approach under NEPA differing from that under section 4(f) is that section 102(2)(C)(5) of NEPA, 42 U.S.C. § 4332 (1970), includes, as a relevant consideration, the study of “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” Such a study may also be necessary in connection with the detailed statement on “alternatives to the proposed action” called for by section 102(2)(C)(iii) of NEPA, 42 U.S.C. § 4332 (1970).

NEPA may require less in the area of environmental protection than the “paramount importance” test for section 4(f) announced by the Supreme Court in Overton Park. See text accompanying notes 96-98 infra.

67. In an analogous situation it has been held that the Secretary of Transportation may not approve part of a “project,” by fragmenting it into segments, if another segment of the same “project” requires a section 4(f) determination. Named Ind. Mem. of San Antonio Conservation Soc’y v. Texas Highway Dep’t, 446 F.2d 1013 (5th Cir.), cert. denied, 400 U.S. 968 (1971). This decision turned, in part, on the prior administrative determination of the scope of the “project.” Apart, however, from the narrow holding that section 4(f) does not authorize the fragmenting of projects, the court based its decision on policy grounds.

The frustrating effect such piecemeal administrative approvals would have on the vitality of section 4(f) is plain for any man to see. Patently, the construction of these two “end segments” to the very border, if not into, the Parklands, will make destruction of further parklands inevitable, or, at least, will severely limit the number of “feasible and prudent” alternatives to avoiding the Park. The Secretary’s approach to his section 4(f) responsibilities thus makes a joke
follows if the FHWA were in any way to approve a corridor which would use protected land, even if portions of the flanking projects as well as the park construction itself were to be financed with state funds. Furthermore, if such an "engineering approval" or other form of the "feasible and prudent" alternatives standard, and we not only decline to give such an approach our imprimatur, we specifically declare it unlawful. Id. at 1023.

The court similarly held that, once having sought federal funding, the state subjected itself to federal law for purposes of the project, and could not thereafter evade section 4(f) by building any part of it with state funds. Id. at 1027-28. See also Township of Hopewell v. Volpe, 2 ERC 1089 (D.N.J. 1969), aff'd on other grounds, 446 F.2d 167 (3d Cir. 1971) (holding as to the applicability of other arguably analogous provisions of title 23 at stages of the highway planning process prior to the request for federal funds); La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971), where "location approval" was sought under 23 U.S.C. § 103 (1970) as a pre-requisite to a possible subsequent request for federal funds. The case held that "projects that may eventually receive federal funds," on which "states keep open the option . . . by securing federal approval at various stages," are covered by section 4(f). Id. at 227.

If, however, the project does not involve federal funds or approvals, and has not been so structured for purposes of evading section 4(f), the section would apparently not to appear as such. Civic Improvement Comm. v. Volpe, 4 ERC 1160 (W.D.N.C.) (semble), aff'd, 459 F.2d 957 (5th Cir. 1972), reached such a result regarding the non-applicability of NEPA to a locally financed loop road, notwithstanding its linkage with federal traffic arteries, where the use of "city funds only is not a device or subterfuge to evade environmental considerations . . . ." Accord, Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537 (7th Cir. 1972). But cf. Ecos, Inc. v. Volpe, 5 ERC 1019, 1022 (M.D.N.C. 1973) which held that provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970), concerning "major Federal action" [Id. § 4332(c)] apply to a 100% state-financed highway segment which "is . . . part and parcel of the East-West Expressway where substantial federal funds have already been expended and are proposed to be expended and thus must be controlled by applicable federal procedural requirements."

A distinction has been drawn between Federal-aid highway planning and federal airport-grant planning, in determining whether a request for federal financial assistance makes construction contracted with non-federal funds "federal" for purposes of permitting such construction to be enjoined because of non-compliance with section 4(f) and other federal environmental protection requirements, such as the National Environmental Policy Act of 1969 [42 U.S.C. §§ 4321-47 (1970)]. See, e.g., City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972). In this case the Massachusetts Port Authority applied for an FAA grant under 49 U.S.C. § 1716 (1970) for the construction of an outer taxiway at Logan Airport. The FAA made a "tentative allocation of funds" under an administrative procedure provided in 14 C.F.R. § 151 (1972). The Boston Redevelopment Authority objected to the project because of threats of noise and future harbor filling. In the meantime, the Port Authority awarded a construction contract and construction began. The FAA refused to process the application further without a detailed environmental impact statement [see notes 69, 91 infra]. Plaintiffs sought a preliminary injunction against further construction on a ground analogous to that used in San Antonio, that the Port Authority itself was precluded from proceeding without compliance with the "special effort" clause of section 4(f), with NEPA, and with certain other requirements applicable to federal projects. The First Circuit affirmed the denial of the injunction, suggesting that the significance of
of decision were to be made by an FHWA official without the Secretary's personal approval, it would be additionally unauthorized because of the Department's reservation of section 4(f) authority to the Secretary.

This line of reasoning may lead to a number of awkward consequences for two reasons. One reason is that the federal-aid highway program has in fact been administered in many instances since 1966 as if section 4(f) did not apply to these determinative decisions, and frequently as if the authority to make such decisions had been delegated to FHWA personnel. Secondly, at least until recently highways have often been deliberately routed through open space in urban areas, in preference to the demolition of homes or commercial or industrial sites.

It is accordingly desirable that the need be faced for a definition of "program or project" in non-title 23 terms in the case of highways,

preliminary approval is different in the case of airports from that in the case of highways. The court stated that after "tentative allocation" stage of airport planning approval:

[T]he whole of a proposed airport project . . . is in the ordinary course given closer scrutiny before final decision . . . than is a highway project after highways location approval . . . . The staged federal approval system for highways may be likened to the successive reviews of an architect's plans, beginning with a broad conceptual rendering of a house in its setting and ending with detailed drawings of plumbing, outlets, and joists. The more simple approval scheme for airport development grants is closer to that of one who first selects qualified bidders and then awards the contract.

The First Circuit's emphasis on a comparison of the FAA's "tentative allocation" procedure with the "location approval" stage of highway planning was based on the observation that in all cases where a court had found a highway project to be "federal," the stage of "location approval" had been reached. The courts in those cases, however, did not rely on the degree of approval, however tentative, which had been granted, or on the closeness of the scrutiny to which the project would be subjected thereafter before final approval. Instead, the courts in San Antonio and La Raza Unida emphasized a concept more like waiver or estoppel. The mere request for federal financing, or the mere keeping open of options to request federal financing later, should preclude a state from proceeding with its own funds without compliance with federal environmental protection requirements.

Since Brackenridge and Olmos parks were the inspiration for the Yarborough amendments which led to section 4(f) [see text at part IB supra], it is ironic that the San Antonio decision led to a strong congressional drive to exempt these parks from the protection of section 4(f). In the 92d Congress, to which Senator Yarborough had not been re-elected, both the House and the Senate passed versions of a proposed Federal-Aid Highway Act of 1972 which purported to defederalize the project involved in the San Antonio case, by permitting Texas to repay federal funds previously advanced for that highway. The bill died at the end of the session, on a point of order. See note 195 infra. The issue was left to be debated anew in the 93d Congress, where individual exceptions to section 4(f) were opposed in principle by the Secretary of Transportation.

68. The approach suggested in the text is supported by Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972), which dealt with a segment of the Richmond
just as such a definition is already clearly required in the case of DOT's non-highway activities. Otherwise the review of decisions which may affect protected lands will not be made when it can most reasonably be done. The decisions will otherwise too often come up when it is unnecessarily difficult to save the protected lands — either when alternatives are no longer feasible and prudent which might have been feasible and prudent, or when the required action, although feasible and prudent, is more expensive than it might have been with different planning from the beginning.

Some recognition of this problem is reflected in a relatively recent development. In August 1971 FHWA issued instructions on the formulation of environmental impact statements required under the National Environmental Policy Act of 1969. These instructions also applied to the processing of section 4(f) determinations, the need for which was made evident by the content of such environmental impact statements under NEPA. In discussing the size of the undertaking which should be the subject of such statements and determinations, the

Metropolitan Beltway. Most of the 75-mile beltway was to be built as part of the Interstate system. The remainder had been designated as Virginia Route 288. The 29.2 miles of Route 288 had been approved as part of the federal-aid primary system, but no federal funds had yet been committed. Plaintiffs sought to protect Tuckahoe, a National Register historic site [see note 77 infra] through which a segment of Route 288, which had not yet been submitted for federal location approval, would pass. The court stated, "The beltway . . . must be viewed as a whole, and at the very least, Route 288 must be so viewed . . . . The highway project with which we are concerned cannot be fractionalized." Id. at 124. The court accordingly enjoined defendants "from taking any steps leading to the condemnation of any portion of the property known as Tuckahoe Plantation". Id. at 128. Defendant Volpe was "enjoined from granting any further approval or federal assistance to any part of the highway commonly known as the Tuckahoe Segment." Id. The action of the court may fall short of the full implications of its language, inasmuch as it is not clear whether work on non-Tuckahoe segments was enjoined and the completion of such work may narrow the options available in considering proposals for the Tuckahoe segment. See also Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972), where the term "project" is apparently used in non-title 23 terms to describe that portion of a proposed state-wide freeway which lies in a given county. An environmental impact statement under NEPA [42 U.S.C. §§ 4321-47 (1970)] had been filed on the northern "segment," but none was proposed to be filed on the southern "segment" because it had received "design approval" before the effective date of NEPA [see text section II D infra]. The court enjoined all work on the entire country-wide "project" until an environmental impact statement was filed covering the entire county-wide "project." It is not clear from the opinion whether the "segments" might constitute title 23 "projects," or whether this is a situation similar to San Antonio where a title 23 "project" was fragmented into "segments." A seven-mile stretch of freeway which is considered separately for "design approval and construction purposes" would typically be a "project" under 23 U.S.C. §§ 105-06 (1970).

69. 42 U.S.C. § 4332(2)(c) (1970) requires all agencies of the federal government to include in every recommendation or report on proposals for legislation and other
instruction uses a new concept, called a "highway section." This is explained in general terms, including the notion that the "section" should comprise "a substantial length of highway between logical termini," which might be the subject of multi-year financing. While this concept is imprecise, it constitutes some evidence that FHWA

major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

The statute has been construed broadly as to the scope of its concerns. See, e.g., Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), cert. denied, Hanly v. Kleindienst, 409 U.S. 990 (1972), where the court stated:

The . . . act contains no exhaustive list of so-called 'environmental consideration,' but without question its aims extend beyond sewage and garbage and even beyond water and air pollution . . . . The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban 'environment' and are surely results of the 'profound influences of . . . high density urbanization [and] industrial expansion' . . . .

Id. at 647.

Unlike section 4(f), NEPA is for the most part procedural, rather than substantive, in the sense that it does not prohibit environmental damage; instead it imposes requirements on the planning process to assure that environmental consequences are identified and articulated before decisions are made. Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971); National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971). Contra, Environmental Defense Fund, Inc. v. Corps of Engineers, 4 ERC 1721 (8th Cir. 1972), which argues that NEPA "[i]s more than an environmental full-disclosure law," that "NEPA was intended to effect substantive changes in decision making," and that "courts have an obligation to review . . . agency decisions [under the substantive requirements of NEPA] on the merits." Id. at 1725. The same position is advanced in Environmental Defense Fund, Inc. v. Froehlke, 4 ERC 1829 (8th Cir.), aff'd 348 F. Supp. 338 (W.D. Mo. 1972). For a discussion of the difference between NEPA methodological requirements and the section 4(f) value preferences, see Note, Citizens to Preserve Overton Park, Inc. v. Volpe: Environmental Law and the Scope of Judicial Review, 24 Stan. L. Rev. 1117 (1972).

70. FHWA Policy and Procedure Memorandum 90-1 § 3a, at 6 (Aug. 24, 1971, as amended, Sept. 7, 1972) [hereinafter cited as PPM 90-1].
itself now perceives the need to consider section 4(f) questions within a context broader than the Title 23 definitions of "program" and "project," and at a stage in the planning process prior to the "approvals," "programs," and "projects" provided for in Title 23.71

B. What Constitutes "Use" of Protected Land?

Ordinarily in DOT programs the last sentence of section 4(f), which provides that "the Secretary shall not approve any program or project which requires the use of [protected lands]", has been viewed as preventing activities which involve the physical occupation of protected land. Such occupation arises either by construction of works upon the land as part of a DOT-financed and approved project, or, as in the Goleta Slough case, by other (non DOT-financed) construction which would be required on the protected land under the same overall program of which the DOT activity is a part. Off-site activities may, however, also be governed by the sentence if they should generate sufficiently serious impacts on the land as to impair substantially the utility of the land for the purposes for which it was used before the off-site DOT activity was undertaken.

There has been little litigation concerning the meaning of "use." In one case, however, the Ninth Circuit has ruled that the encirclement of an alpine campground by a freeway is a "use" of the recreational area for purposes of section 4(f), and has stated: "The word 'use' is to be construed broadly . . . in cases where environmental impact appears to be a substantial question."72

71. It has been held, for purposes of the NEPA requirements for "a detailed statement on . . . alternatives to the proposed action" and for a "study" of "appropriate alternatives" [42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(D) (1970)], which raise questions similar to those under section 4(f) concerning the appropriate length of highway to be considered in connection with "alternatives," that:

If an impact statement is prepared with respect to a small length of a proposed highway, . . . [the] requirements of adequate consideration of alternatives cannot be complied with . . . . While no precise mileage for an appropriate length can be specified, the test is whether the length selected assures adequate opportunity for the consideration of alternatives (both whether and where to build) required by the Act.


72. Brooks v. Volpe, 460 F.2d 1193, 1194 (9th Cir. 1972). DOT, moreover, has recognized the principle that a transportation project can be physically separated from a protected area and still constitute a "use" within the meaning of section 4(f). DOT Reprint of Statement of Herbert F. DeSimone, Assistant Secretary of Transportation for Environment and Urban Systems, before the Senate Committee on Commerce Regarding S. 728, May 3, 1971. In this statement he said that DOT "has adopted . . . [a] broader meaning of section 4(f) so as to "provide protection" in situations where "a transportation facility is located adjacent to a protected area but does not require the taking of land from it" in "the physical sense, but would sub-
1. FAA Problems as to "Use"

The "use" of land concept is particularly difficult as applied to FAA activities as contrasted with the highway program. In some cases the effect of an FAA approval is the same as that of an FHWA approval; for instance, if FAA approves a grant toward the construction of an airport upon protected land, the applicability of section 4(f) is obvious. If, however, the FAA approval involves flights over protected land, instead of physical construction upon it, more complex questions arise.

The effect of overflights could be so disruptive as to amount to a taking,73 in which case it might be fair to consider that "use" of the land is involved for section 4(f) purposes. On the other hand some park and recreation uses are considered entirely compatible with nearby airport developments. Indeed the FAA encourages local airport authorities to provide for land use controls so that lands over which overflights would be entirely disruptive are brought under airport ownership. Under such controls other adjacent lands which might be suitable for special uses, such as recreation, are developed as golf courses and the like. There is no evidence that Congress intended to discourage substantially interfere with the use to which that land is dedicated." Id. at 4. Senate Bill 728, 92d Cong., 1st Sess. (1972), as introduced by Senators Hartke and Hart, would have, inter alia, added the words "... has an adverse effect on the environment in ..." before "requires the use of land from ..." in section 4(f).

During the 1969 controversy concerning the Miami Jetport, near the Everglades National Park, the view was expressed within the Department of the Interior, with which DOT did not disagree, that:

[O]verflights, if sufficiently low and frequent, could involve a taking of property rights, ... [and that] although the issue is not completely free from controversy, this office would view the term "use" as it appears in section 4(f) to be sufficiently broad ... to include overflights of such a level that a private landowner would be entitled to compensation for a taking of a property right ... [and] could include constructive use which operates to limit or prevent use of the park or conservation of lands by the public for their intended purposes.

Memorandum from Bernard R. Meyer, Associate Solicitor, Parks and Recreation, to Solicitor, Department of the Interior, May 29, 1969. DOT differed only on the question of whether park overflights attributable to the jetport would in fact be "sufficiently low and frequent."

such land use planning by establishing a presumption against all flights over parks or recreation areas as such, or over historic sites.

This approach may, however, overlook important residual problems. It is conceivable that noise from overflights might fall short of a taking and yet seriously impair some park and recreation functions, such as the enjoyment of concerts or the appreciation of some historic sites. Furthermore, while overflights may be reasonably suitable over some park and recreational activities, such as baseball, they can be seriously annoying for others, such as the quest for solitude in the wilderness.74 A troublesome dilemma is accordingly posed for the conscientious administrator. If he should construe the "use" of protected lands, under the third sentence of section 4(f), to encompass overflights which amount to less than a taking, the section would inhibit land use planning (such as the siting of ballparks near airports) which can be highly desirable from the point of view of environmental controls, and which Congress probably had no intention of curtailing. He might

74. See, e.g., The Wilderness Act of 1964, 16 U.S.C. §§ 1131–36 (1970) which provides for the preservation of "wilderness areas." These are areas:

[I]n contrast with those . . . where man and his own works dominate the landscape . . . where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean . . . an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation . . . .

Id. § 1131(c) (emphasis added). A quest for solitude is apparently, therefore, only one type of wilderness recreation, not the only type. To the extent that the defining characteristics of wilderness turn on the transitory impact of man, and the opportunity for "a primitive and unconfined type of recreation," aircraft overflights are not necessarily incompatible with the wilderness. Yet preserving the opportunity for solitude is clearly one of the objectives of the Act, and presumably one which should be achievable somewhere, even if it need not be capable of realization everywhere. Unless a conscious effort is made to route audible overflights away from some wilderness areas, however, there may be no such areas suitable for solitude undisturbed by mechanical noise. Freedom from mechanical noise is explicitly relevant to the Act's objectives; with certain exceptions, roads are prohibited in wilderness areas, as well as the use of "motor vehicles, motorized equipment or motorboats," other forms of "mechanical transport," and the landing of aircraft. Id. § 1133(c) (emphasis added). Yet the statutory requirements for such silence are not absolute. Exceptions are available for certain commercial [Id. §§ 1133(c), (d)(3)] and administrative purposes. Id. § 1333(c). It is generally assumed that the Wilderness Act does not itself authorize the prohibition of aircraft overflights, but only landings, despite a somewhat unclear provision that "[w]ithin wilderness areas . . . the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable." Id. § 1133(d)(1) (emphasis added).
also face totally unworkable limitations in the use of available airspace; and he might be forced by whatever adjustments he makes in flight patterns to intensify noise problems over residential areas. If, however, he should ignore the sub-taking overflight problem over all protected lands, he would certainly be participating to some extent in the degradation of values which section 4(f) was intended to protect.

A practical solution may be to rely on the first "... special effort ..." sentence of section 4(f), rather than on the last "... shall not approve ..." sentence. Under this approach a sub-taking overflight would not be considered a "use." Accordingly, there would not be an automatic presumption against flights over all protected lands. The FAA would still be obligated to make a "special effort" to "preserve" protected lands, as well as "the natural beauty of the countryside," which might include aural as well as visual aesthetic values. In such cases, where the limitations of overflights would be relevant to the preservation of the protected values, the FAA would be under an obligation at least to try, and could be held accountable to demonstrate what effort was made.

The FAA would be free under this theory to experiment with overflight limitations over specific portions of wilderness areas, without conceding the obligation to impose such limitations over all of a wilderness area, or over all wilderness areas. If the overflights are not a "use," they are not subject to a blanket prohibition, and reasonable limitations could be tailored consistent with actual airspace requirements in the exercise of an appropriate "special effort."

Some reluctance may be experienced on the part of FAA personnel who would like to make such an effort, but who might fear that this would be prejudicial to the necessary operations of aircraft over populated areas. They may anticipate the argument that if, for instance, a five thousand foot minimum altitude is prescribed over a wilderness,75

75. A 5,000 foot minimum on flights over Everglades National Park was imposed by DOT on aircraft using the Miami Jetport training facility, with an exception for one limited area, comprising about nine miles square, where altitudes to 3,000 feet were permitted under instrument flight conditions when required for separation safety. However, take-off and landing patterns at the training site were totally prohibited from overflying the Park. Letter from John A. Volpe, Secretary of Transportation, to Senators Case, Hart, Jackson, and Nelson, Oct. 29, 1969, reprinted in O. Gray, Cases and Materials on Environmental Law 1022, 1023 (1970). Because of these limitations it was not thought that the jetport constituted a "use" of the Park. A subsequent "Everglades Jetport Pact," negotiated in January 1970 under the leadership of the Department of the Interior with respect to environmental considerations, is less explicit; it provides for rules to "limit all training operations for overflying the Everglades National Park at altitudes below 5,000 feet, except when operating under instrument flight rules." O. Gray, Cases and Materials on Environmental Law 1030, 1034 (1970). Under the Pact, therefore,
citizens in the flight path near an urban airport would demand equal treatment. This concern assumes that the only position commercial aviation can assert to the citizen is the pretense that overflight noise is not unpleasant, and that this position would be undermined by any effort to minimize such noise anywhere. It would, however, be reasonable to recognize that such noise is unpleasant to most people; that it is not always possible to prevent it; but that, where it can be limited, a special effort should and will be made to do so, over both wilderness and populated areas.

2. "Use" of vs. "Effect" on Historic Sites

In addition to the prohibition against approving the "use" of historic sites under the last sentence of section 4(f), the Secretary of Transportation must, under section 106 of the National Historic Preservation Act of 1966,76 "take into account the effect" of any "undertaking" on any property included in the National Register of Historic Places,77 and must "afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."78

The Advisory Council considers an undertaking to have an "effect" on a National Register property "when any condition of the undertaking creates a change in the historical, architectural, archeological or cultural character that qualified the property . . . for listing in the National Register."79 It assumes that an "adverse effect occurs in it is less clear than under the original DOT restrictions that take off and landing overflights are to be prohibited at all altitudes, and the exception for instrument flight rule conditions is to be limited to a specific area, and to be subject to a 3,000 foot altitude floor.

77. The National Register, authorized pursuant to section 101(a)(1) of the National Historic Preservation Act, 16 U.S.C. § 470a(a)1 (1970), is maintained by the National Park Service of the Department of the Interior. It lists "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture." It has been estimated that over 200,000 places will ultimately be included. Conversation with Dr. Sidney Bredford, Department of the Interior, June 24, 1971.
78. 16 U.S.C. § 470f (1970). The Advisory Council on Historic Preservation was established by section 201 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470i (1970). It is composed of twenty members: ten are appointed by the President from outside the federal government; eight are federal administrative heads (the Secretaries of the Interior, Housing and Urban Development, Commerce, Agriculture, Treasury, and Transportation, the Attorney General, and the Administrator of the General Services Administration), and the remaining two are the Secretary of the Smithsonian Institution and the Chairman of the National Trust for Historic Preservation. Id. § 470i(a) (1970).
79. The Advisory Council's "Effect Criteria" are set out at 37 Fed. Reg. 5429-30 (1972). These "Effect Criteria" in turn refer to the National Park Services "Na-
conditions which include but are not limited to . . . isolation from or alteration of its surrounding environment” and “introduction of visual, audible, or atmospheric elements that are out of character with the property and its setting.”

If an historic site is listed on the National Register, therefore, an “effect” which might not be considered a “use” for purposes of section 4(f) could still require protective attention from the Secretary under the National Historic Preservation Act of 1966. Noise and other “visual . . . or atmospheric elements” clearly need not amount to a taking to be out of character with the property and its setting. An off-site interference with the view at an historic site could be considered such an “effect” in cases where it would be difficult to demonstrate that the project in question “uses” any land from the site. For instance, such questions have been raised over a proposed bridge in Baltimore harbor, which might spoil the visual setting in which Fort McHenry is situated. The bridge could hardly be considered to “use” Fort McHenry, but it might well be considered to affect it. Other, more nearly borderline cases as to “use” pose proportionately less difficulty in qualifying as an “effect” under these criteria.

Similarly, an increase of traffic through a nearby historic district might result from the financing of a highway project or from the approval of a bridge. The highway or bridge would not physically occupy land from the historic district. Regardless of the arguments which could be mustered for or against the proposition that, nevertheless, the traffic consequences themselves constitute a section 4(f) “use,” little effort is required to qualify such consequences as section 106 “effects,” which must at least be taken “into account,” and on which the Advisory Council must have an opportunity to comment.

80. Advisory Council Effect Criteria, note 79 supra.

81. The effect would result from the “introduction of visual . . . elements that are out of character with the property and its setting.” 37 Fed. Reg. at 5430. See note 80 supra and accompanying text. An interstate highway bridge might also introduce incompatible “audible” or “atmospheric” elements. Id.

82. Such a situation has arisen in Charleston, South Carolina, in connection with a proposed bridge across the James River. The bridge would not itself be built in a historic district, but it might bring additional traffic through the district, “with
In all these historic preservation situations where there is ambiguity as to the "use" of land, the first sentence of section 4(f), requiring "special effort . . . to preserve . . . historic sites," reinforces section 106 of the 1966 Historic Preservation Act, and serves as a backstop to the last ("shall not approve . . .") sentence of section 4(f). The requirement of a "special effort" does not depend upon a finding of "use."

If the site is a property listed in the National Register, section 106 provides a particular method for obtaining authoritative information about the relationship between the proposed project and the site, and an informed judgment as to what is needed in the way of a special effort. This is important not only because the Advisory Council's comments under section 106 provide guidance to the Secretary as to what he should do, but also because they can strengthen his hand against proponents of an unaltered project by virtue of their status as a recommendation of independent experts.83

the potential for introducing 'visual, audible or atmospheric elements' which too often qualify as an adverse impact, by any definition." Remarks by Herbert F. De Simmone, Assistant Secretary of Transportation for Environment and Urban Systems, The National Trust for Historic Preservation Conference on Legal Techniques in Historic Preservation, Washington, D.C., May 1, 1971. A similar question may develop in connection with traffic generated as a result of the proposed Three Sisters Bridge project in Washington see note 45 supra. This traffic could have a greater effect than the bridge itself upon the Georgetown historic district although, unlike the Charleston historic district, the Georgetown district already has heavy traffic. The applicability of section 106 in this case depended on a construction of section 23 of the Federal-Aid Highway Act of 1968, P.L. 90-495, § 23, 82 Stat. 827, which provides:

Notwithstanding any other provision of law, or any court decision or administrative action to the contrary, the Secretary . . . shall . . . construct all routes on the Interstate System within the District of Columbia as set forth in . . . House Document Numbered 199 [which includes the Three Sisters Bridge] . . . .

Such construction shall be undertaken as soon as possible . . . and shall be carried out in accordance with all applicable provisions of title 23 of the United States Code.

It was not clear whether section 106, which is not part of title 23, was rendered inapplicable by the phrase "[n]otwithstanding any other provision of law." Applicability has, however, been confirmed in District of Columbia Fed'n of Civic Ass'n v. Volpe, 459 F.2d 1231 (D.C. Cir.) (supplemental opinion and statement on the denial of a rehearing), cert. denied, 405 U.S. 1030 (1972).

83. The Presidential appointees to the Advisory Council have included noted experts in landscape architecture and architectural history. The Advisory Council's comments may also have some psychological influence upon a cabinet member in that they represent the views of a body in which other cabinet members nominally sit. The most important case, for instance, in which the Advisory Council's comments led to the cancellation of a project concerned a proposed Riverfront Expressway through the New Orleans Vieux Carré. After reviewing the comments of the Advisory Council, Secretary Volpe ordered the highway removed from the Interstate system "because the highway would have seriously impaired the historic quality of New Orleans' famed
At the same time the Advisory Council's comments under section 106 provide the public and the courts with a benchmark against which to measure the Secretary's "special effort." By establishing a presumption as to the content of the "special effort" requirement in a particular case, the Advisory Council's report under section 106 invests the first sentence of section 4(f), which might otherwise be considered merely hortatory, with a measure of specificity sufficient, perhaps, to provide a basis for enforcement against the Secretary. The Secretary is not obliged under section 106 to follow the Advisory Council's advice. If he disregards the Advisory Council's comments, however, he may find that he has acquired the burden of persuasion that he has made a section 4(f) "special effort," whereas in the absence of such recommendations he might have enjoyed a presumption as to the regularity of his performance under the statute.

The section 106 procedure for Advisory Council comments, furthermore, provides public financing and manpower for the staff work necessary to develop a thorough evaluation of both the consequences of a proposed undertaking and the feasibility of alternatives. It is ordinarily difficult for citizens' groups to provide the technical studies necessary to rebut a government-sponsored project. Under section 106, however, the resources of the National Park Service staff for the

84. There has been little judicial reference to the "special effort" clause in the first sentence of section 4(f). For a rare example of such a reference see Pennsylvanian Environmental Council v. Bartlett, 454 F.2d 613, 620-21 (3d Cir. 1971). In that case the "special effort" clause of section 2(b)(2) of the DOT Act [49 U.S.C. § 1651(b)(2) (1970)], which is identical with the first sentence of section 4(f) [see text accompanying note 41 supra], was construed to constitute an exception to the provisions of 23 U.S.C. § 117 (1970), which provides that the Secretary may rely on a state highway department's certificate of compliance with applicable standards in the case of the federal-aid secondary system. An unsuccessful attempt to invoke the "special effort" clause is reported in City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).

85. An analogous shift in the burden of persuasion has been suggested in the case of noncompliance with the NEPA requirement for a detailed environmental impact statement [42 U.S.C. § 4332(2)(c) (1970), see note 69 supra]. In Sierra Club v. Froehlke, 5 ERC 1033 (S.D. Tex. 1973), it was held:

[O]nce a prima facie showing has been made that the federal agency has failed to adhere to the requirements of NEPA, the burden must, as a general rule, be laid upon this same agency which has the labor and public resources to make the proper environmental assessment and support it by a preponderance of the evidence contained in the impact statement.

Id. at 1062.
Advisory Council, as well as of the agencies represented on the Advisory Council, and the talents of the individual council members themselves, can be marshalled in the cause of historic preservation. With these efforts an analysis can be made which may persuade the Secretary’s staff, or at least key members of his staff, and thereby assure a favorable presentation to the Secretary within his own department. At a minimum such a report requires him to focus on a specific preservation proposal, and on the justification, if any, for his failure to require that it be adopted.

It may be argued that the situation under the combination of the first sentence of section 4(f) and section 106 is not different from the situation under section 106 alone. Such an argument assumes that the Secretary’s duty under section 106 to “take into account the effect of the undertaking” necessarily includes the duty spelled out in section 4(f) to make “a special effort . . . to preserve” the historic site. This assumption has obvious appeal to a lawyer; why should Congress require an agency head to think about something unless it wanted him to try to do something about it?

In at least two respects, however, there are practical reasons for preservationists to welcome the “special effort . . .” language in addition to the language of section 106. First, non-lawyer administrators are inclined to draw distinctions which their counsel would not suggest, and to do so without consulting their counsel. Some such highway officials might be inclined to brush off their responsibilities with respect to Advisory Council comments on the theory that to “take into account . . .” means merely to read, with complete freedom to reject. Even to the eye of a non-lawyer, however, “special effort . . .

86. See notes 78 and 83 supra.

87. Some non-lawyer administrators have tended to interpret the requirement of “consideration” of specified questions to mean that they may comply by saying that they have given consideration to such questions, but feel no compulsion to give the subject significant attention. [See the warning of Congressman Richard D. McCarthy, note 39 supra]. Congress experienced a similar problem with 23 U.S.C. § 128 (1970), which required, before 1970, that the State highway departments certify to the Secretary that they had held, or offered to hold, hearings on certain highway projects passing through towns, and had “. . . considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.” The danger of rubber-stamp certifications to such “considerations” led Congress to amend that section in 1970 by adding the requirement that “[s]uch certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.” 23 U.S.C.A. § 128 (Supp. 1973). For further confirmation that the non-lawyer’s approach is not necessarily the lawyer’s, see Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971), which upheld the applicability of the requirement in section
to preserve . . .” clearly requires an effort in a preferred direction and, coupled with the Advisory Council’s comments under section 106, may well require that such effort, absent good reason, support those Advisory Council comments. In addition, a different kind of question arises if a recommended preservation effort would cost more money than the original project. Where, for example, is the authority to spend highway funds for historic preservation, if the highway project is to be made more expensive in the interests of preservation? To “take into account . . .” under section 106 may imply that one must try to follow the Advisory Council’s comments, all things being equal; it does not clearly authorize the expenditure of additional highway funds for the purpose. To make “a special effort . . .” seems to imply more, that at least some extra funds might be spent, since otherwise the effort would not appear to be very “special.”

The increase-of-traffic situation discussed above assumes that the affected historic site is on the National Register and that there is some ambiguity as to the “use” of land from the site. It should be noted, however, that even if a non-National Register historic site is involved, at least part of section 4(f) still applies, although section 106 may not. At a minimum the Secretary must make a “special effort . . . to preserve” the site under the first sentence of section 4(f), and he may, depending on the circumstances, be further constrained by the “shall not approve . . .” requirements of the third

106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1970) [see note 76 supra and accompanying text] that an agency “take into account the effect of a proposed undertaking” to block grants by the Law Enforcement Assistance Administration. The court stated that:

[I]f the LEAA, after following the precepts of NHPA . . ., makes a good faith judgment as to the consequences, courts have no further role to play. We note, however, that a federal agency obligated to take into account the values NHPA . . . seek[s] to safeguard may not evade that obligation in keeping its thought processes under wraps. Discretion to decide does not include a right to act perfunctorily or arbitrarily. That is the antithesis of discretion. The agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it must also make a sufficiently detailed disclosure so that in the event of a later challenge to the agency’s procedure, the courts will not be left to guess whether the requirements of NHPA . . . have been obeyed.

Id. at 1138 (emphasis added).

Similarly, the District of Columbia Circuit has stated, with respect to the requirements of NEPA that reports on certain projects include detailed statements as to their environmental impact, “. . . a purely mechanical compliance with the particular measures required . . . will not satisfy the Act if they do not amount to full good faith consideration of the environment.” Calvert Cliffs’ Coordinating Comm., Inc. v. United States Atomic Energy Comm’n, 449 F.2d 1109, 1113 n.3 (D.C. Cir. 1971).
sentence. If, on the other hand, the site is on the National Register, but there is no ambiguity as to "use," and if the site meets the requirements as to "significance" in the last sentence of section 4(f), the benefit of the Advisory Council's section 106 comments may be even more striking in aid of section 4(f)'s "shall not approve..." provision than its effects when coupled only with the "special effort..." requirement.88

C. The Meaning of the "... Shall Not Approve..." Conditions

Four phrases in particular have required attention under the last sentence of the section (apart from the question, discussed above, arising from the Statement of the Managers on the part of the House, as to whether the provision is "mandatory" or "discretionary"): The "no feasible and prudent alternative" phrase; the "all possible planning to minimize harm" phrase; the "publicly owned" language; and the "significance" requirement.

1. Feasible and Prudent Alternative

There has been more concern with the meaning of "feasible" and "prudent" than with the meaning of "alternative," especially in the federal-aid highway program. The alternatives likely to be considered for a highway by highway planners are alternative locations for the same road, rather than the alternative of a non-highway form of transportation,89 or the alternative of doing nothing,90 or the alternative of attempting to reduce traffic by changing the land use plans.

88. For a discussion of further interplay between the requirements of section 4(f) and section 106 of NHPA with other legislation applicable to DOT programs see Gray, The Response of Federal Legislation to Historic Preservation, 36 LAW & CONTEMP. PROB. 314, 317-22 (1972).

89. Arlington Coalition v. Volpe, 458 F.2d 1323, 1337-38 (4th Cir. 1972) (semble) stated: "From today's vantage point, the economic effects of Arlington I-66 might be significantly different than projected in 1958 — rapid rail service might better satisfy the needs of this area than would I-66."

90. See District of Columbia Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972) where the court stated: "It is not inconceivable for example, that the Secretary might determine that present and foreseeable traffic needs can be handled... without construction of an additional river crossing. In that case, an entirely prudent and feasible alternative to the Three Sisters Bridge might be no bridge at all...." Secretary Volpe explicitly discussed the no-highway alternative in his consideration of the Lake Allatoona project. [note 189 infra]. In Stop H-3 Ass'n v. Volpe, 4 ERC 1684, 1685 (1972), relating to the discussion of alternatives required for a NEPA environmental impact statement on a proposed highway, the court stated: "the alternatives before the Secretary of Transportation include not only the various ways of proceeding with the project but also the total abandonment of the project."
Department of Transportation Act

on which the projected demand is predicated. Such alternatives are not, however, excluded by the statutory language. In other contexts Congress has already required that transportation planning cover various modes of transport and has recognized that such planning may have to include restrictions on the use of the private automobile, particularly in congested urban areas. Congress has, further, directed that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment." If highway planners are unable to show that there has been such an interdisciplinary search for non-highway alternatives, or for highway alternatives directed at the reduction of automobile traffic, such as exclusive bus lanes, and hence the reduction of the need for traffic lanes, they may be unable to sustain the no-alternative burden which must be met before protected lands may be used under section 4(f).

Assuming that an alternative is identified for consideration, it must be demonstrated to be either not "feasible" or not "prudent" before protected lands may be used. "Feasible" smacks of technical considerations, "prudent" of the entire range of concerns relevant to wisdom.

91. A somewhat analogous issue can arise when an agency is required to make a detailed environmental impact statement describing the consequences of a proposed action, under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1970). That section requires a discussion of alternatives to the proposed action. It has been held that in some circumstances the discussion of alternatives must include consideration of "reasonably available" alternatives outside the jurisdiction of the agency proposing the action and making the statement. National Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972). It may be, however, that such alternatives require discussion for purposes of NEPA without being deemed to exist for purposes of section 4(f).


93. Clean Air Act § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970) requires the states to adopt plans for the "implementation, maintenance, and enforcement" of certain air quality standards within three years after the approval of the standards. It also provides for federal approval of these implementation plans if the Administrator of the Environmental Protection Agency determines, inter alia, that they include "such . . . measures as may be necessary to insure attainment and maintenance of such . . . standard, including, but not limited to, land-use and transportation controls . . ." 42 U.S.C. § 1857c-5(a)(2)(B) (1970). Such land-use and transportation controls were considered necessary because of the effect of pollution emissions from automobiles on air quality, particularly in congested areas. See Clean Air Act §§ 101(a)(2), 202, 42 U.S.C. §§ 1857c-5(a)(2), 1857f-1 (1970); 116 Cong. Rec. S20600, S20609 (1970) (remarks of Senator Muskie during the Senate debate on the Clean Air Act Amendments of 1970 and exhibit 1 attached thereto).

Since both words appear it is not necessary to refine "feasible" beyond the general concept of capability of being built, or of being made to work, with available technology. Nuances as to other factors which might tend to make an engineering project inadvisable, such as excessive cost, need not be addressed as questions of feasibility, since they can be considered under the requirement of prudence.

"Prudent" means more, apparently, than merely wise. The Supreme Court undertook an exegesis in March 1971, in *Citizens to Preserve Overton Park v. Volpe*. The Court unanimously rejected defendants' contention "that the requirement that there be no other 'prudent' route requires the Secretary to engage in a wide-ranging balancing of competing interests . . . [and that] the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these . . ." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971).

95. "[T]he requirement that there be no 'feasible' alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971).

96. 401 U.S. 402 (1971). The Court summarized the background of the case as follows:

Overton Park is a 342-acre city park located near the center of Memphis. The park contains a zoo, a nine-hole municipal golf course, an outdoor theatre, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest. The proposed highway, which is to be six-lane, highspeed, expressway, will sever the zoo from the rest of the park. Although the roadway will be depressed below ground level except where it crosses a small creek, 26 acres of the park will be destroyed. The highway is to be a segment of Interstate Highway I-40, part of the National System of Interstate and Defense Highways. I-40 will provide Memphis with a major east-west expressway which will allow easier access to downtown Memphis from the residential areas on the eastern edge of the city.

Although the route through the park was approved by the Bureau of Public Roads in 1956 and by the Federal Highway Administrator in 1966, the enactment of § 4(f) of the Department of Transportation Act prevented distribution of federal funds for the section of the highway designated to go through Overton Park until the Secretary of Transportation determined whether the requirements of § 4(f) had been met. Federal funding for the rest of the project was, however, available; and the state acquired a right-of-way on both sides of the park. In April 1968, the Secretary [Alan S. Boyd] announced that he concurred in the judgment of local officials that I-40 should be built through the park. And in September 1969 the State acquired the right-of-way inside Overton Park from the city. Final approval for the project — the route as well as the design — was not announced until November 1969 . . . . Neither announcement approving the route and design of I-40 was accompanied by a statement of the Secretary's factual findings. He did not indicate why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park.

Id. at 406-408.
other factors whether, on balance, alternative feasible routes would
be 'prudent.' Justice Marshall observed that it is always cheaper
and less disruptive to build through parks than through privately owned,
occupied land. Since these factors "are common to substantially all
highway construction . . . . if Congress intended these factors to be
on an equal footing with preservation of parkland there would have
been no need for the statutes." Cost and community disruption are
not to be "ignored," but "the very existence of the statute indicates
that parkland was to be given paramount importance." Parkland,
and presumably the other categories of land which are accorded the
same protection under section 4(f), "were not to be lost unless there
were truly unusual factors present in a particular case or the cost
of community disruption resulting from alternative routes reached
extraordinary magnitudes . . . . [T]he Secretary cannot approve the
destruction of parkland unless he finds that alternative routes present
unique problems." This formulation came as a pleasant surprise to the friends of
parkland in DOT. The staunchest environmentalists in the Office of
the Secretary had not gone quite this far before the Supreme Court
spoke. They too had argued that parkland should not be considered
on a parity with non-environmental considerations, but should be
favored. They had based these arguments partially on the same reason-
ing as the Court's (that is, why else the statute?), and partially
on the requirement in section 2 (b) (2) and in the first sentence of
section 4(f) for a "special effort to preserve . . . parks." They had
not, however, asserted that parkland could never be used unless al-
ternatives presented "unique problems," or that the cost or disrup-
tion of alternatives must first reach "extraordinary magnitudes." Their restraint was based in part on conceptual difficulties with the
case of the insignificant taking from a significant park (discussed be-
low under "The 'Significance' Requirement"). Meanwhile, as noted
above, other advisors to the Secretary, particularly from FHWA,
had been arguing for an even weaker interpretation. This position
was based on the "discretionary" concept in the House Managers'

97. Id. at 411.
98. Id. at 412, 413 (emphasis added). When the issue was ultimately remanded
to Secretary Volpe for new determinations under the criteria, he decided that the project "cannot be approved." Secretarial Decision on I-40, Overton Park, Memphis,
Tennessee, Jan. 18, 1973. For a court of appeals paraphrase of the Overton Park
test, see Monroe County Conservation Council v. Volpe, 4 ERC 1886, 1889–90 (2d Cir. 1972) where the court stated: "In other words, a road must not take parkland,
unless a prudent person, concerned with the quality of the human environment, is
convinced that there is no way to avoid doing so."
99. Note 37 supra.
Statement on the 1968 Conference Report and on other Congressional materials which came primarily but not entirely from the House Public Works Committee. These materials indicated that the protection of parklands should be subject to "balancing" with other social objectives, particularly the minimization of housing condemnations. The net result, it is probably fair to conclude, is that before March 1971 neither Secretary Alan S. Boyd nor Secretary John A. Volpe ever made a section 4(f) determination — that "there is no feasible and prudent alternative" to the use of parks or other protected land — with the understanding that the phrase means what the Supreme Court said it means in *Overton Park*.\(^{100}\)

If costs are to be considered to some degree, two further problems arise: first, the criteria by which costs should be judged acceptable or excessive; and second, the extent to which the judgments

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100. Several courts have indicated that the Supreme Court's explanation of "feasible and prudent alternative" in *Overton Park* came as a surprise. In the remand of that case for further findings, for instance, the district court stated:

> [E]ven if it could be said that Secretary Volpe made a determination that there was no 'feasible and prudent' alternative to the park route, it is clear that he did not give these words the interpretation that the Supreme Court did and that therefore he did not apply the correct legal standard . . .

In this connection, it should . . . be pointed out that the Supreme Court's interpretation of § 4(f) is contrary to what the Department of Transportation and its Secretary must have expected it to be . . .

> [T]he Court has by its interpretation narrowly limited the choices of the Secretary. In doing so . . . the Court gave no effect to the proviso in § 4(f) having to do with decisions by local officials. . . . [T]he Secretary's position in this court when this case was first before us and his position in the Supreme Court was that he was indeed entitled, under § 4(f), to balance the detriment to the park against the disadvantages of a route that would avoid the park. There is nothing in the administrative record to indicate that anyone in the Department of Transportation in 1969 had any notion that § 4(f) so narrowly constricted the Secretary's options. The record is clear that Secretary Boyd, when he approved the park route in April, 1968, gave very great weight to the fact that the route had been approved by the City Council of Memphis, which, in the light of the wording of § 4(f) and the legislative history, is certainly understandable, but as we have seen, no weight may be given to the fact of approval by local officials.

Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873, 879-80 (W.D. Tenn. 1972). While this may reflect a certain defensiveness there have been other opinions indicating that the Supreme Court's interpretation in *Overton Park* constituted a significant change. In Harrisburg Coalition Against Ruin. Envir. v. Volpe, 330 F. Supp. 918, 928 (M.D. Pa. 1971), a remand was ordered because *Overton Park* was treated as an "intervening [change] . . . in the law after an administrative decision [had] . . . been made but before final decision by the District Court." Similarly, in *San Antonio*, the Fifth Circuit treated *Overton Park* as a "changed condition" warranting reconsideration of an earlier decision adverse to plaintiffs, despite the Supreme Court's denial of certiorari [400 U.S. 968 (1970)] in the earlier action. 446 F.2d at 1020.
should be considered matters of administrative expertise, to which the courts should defer, as distinguished from policy choices in a realm in which judges may decide for themselves. These problems also apply to the analysis of “all possible planning to minimize harm” and of the limits of judicial review, and are discussed below under those headings.

2. All Possible Planning To Minimize Harm

While the “no feasible and prudent alternative” test refers to highway location — whether to use parkland or not — the “all possible planning” test refers to design. It has, furthermore, always been understood to mean actual design — not merely the planning process but its implementation as well. Before Overton Park it was assumed in DOT that “all possible” is a stiffer requirement than “feasible and prudent,” but that, on the other hand, “possible” does not mean “possible.” The conventional approach in FHWA has been that anything is “possible” for engineering, at some cost, but that Congress did not require that parkland be saved if the only alternative is “by way of the moon.” Therefore, “possible” came to mean, in FHWA, that the alternative must be acceptable to state and local authorities, and that its costs not be excessive. There were no formal guidelines as to acceptable costs. Ordinarily in practice an increase not greater than ten percent of the total cost of a project would appear “possible.” Planning to minimize harm would encounter resistance in FHWA if it added more than ten percent to the cost of a project, especially if such increase were opposed by the state highway department.

The amounts which FHWA would ordinarily be willing to spend for minimizing harm under the “all possible planning” concept were limited not only by the small percentage limit on cost increases, but even more by the artificially small base against which the percentage was applied, that is, the “project.” A “project” is the limited amount of work which appears appropriate on a case by case basis to be let under a single construction contract. Therefore, a single bridge, or a bridge and its approaches, might be a “project,” as might a small stretch of road of a mile or two or five. The relevant base is often greater. The “project” may be one of many similar projects designed to connect two points or to cross a city. If, in determining whether a proposal for minimizing harm is “possible,” it is proper to include an evaluation of whether its cost is so excessive as to render it not “possible,” the evaluation should be in relation to the cost of the overall relevant undertaking, and not merely the cost of the limited “project.”
In the Overton Park case, for instance, there were unresolved issues concerning the design of the proposed interstate highway, as well as fundamental questions as to its location. As designed by the Tennessee Highway Department, the road was to be depressed through part of the park, but was to rise so as to pass over a stream, Lick Creek, which crosses the suggested route near the entrance to the municipal zoo. If the road was to go through the park, the citizens’ groups would have liked to have had it buried in a tunnel, so as to be completely invisible. As a less acceptable alternative, the preservationists would have preferred that the road be depressed throughout its length to a depth greater than the height of any vehicles, and partially covered with platform lids so as to preserve continuity of visibility across the surface of the park.

The grounds on which these suggestions were opposed illustrate the ambiguities as to criteria in FHWA’s administration of section 4(f), and the difficulties in separating issues to which the agency’s specialized expertise may be relevant from policy choices which should be approached by non-technical administrators and courts from the viewpoint of statutory construction rather than civil engineering. The grounds for the opposition were:

a. That the project does not damage the park, or that the proposed changes would not be beneficial to the park, and therefore would not “minimize harm.” This raises the question of who is to judge park values. The Department of the Interior strongly supported the design changes which were proposed by the conservationists and opposed, in the Nixon Administration, by FHWA. If courts are

101. The discussion herein on the factual aspects of the Overton Park controversy is based on “the full administrative record that was before the Secretary at the time he made his decision.” 401 U.S. at 419. This “administrative record” comprised the documents which had been generated in the Department of Transportation in connection with its consideration of the Overton Park project. The Supreme Court required that this administrative record be considered by the district court on remand of the proceedings, in order to establish whether the Secretary of Transportation had made a proper determination under section 4(f). Id. This Record is on file in the office of the Maryland Law Review and was made available to me by counsel for plaintiffs, John W. Vardaman, Jr., Esq., who is, of course, not responsible for any of my views.

102. 401 U.S. at 408 n.18.

103. Administrative Record, Memorandum from F.C. Turner, Federal Highway Administrator, to John A. Volpe, Secretary of Transportation, Aug. 18, 1969. The Memorandum stated that “every effort is now being made to minimize the damage, if indeed it is 'damage,' to the park.” Id. at 2.

104. Administrative Record, Letter from Walter J. Hickel, Secretary of the Interior, to John A. Volpe, Secretary of Transportation, July 18, 1969. Some of the design changes sought by the plaintiffs had been proposed by DOT under the Johnson
to defer to administrative expertise, the only agency which should
merit such deference is an agency which has institutional competence
on the matters at issue. When the parkland benefits or damages in
question are matters of civil engineering, perhaps FHWA has such
competence. Usually, however, the issues relate primarily to parkland
aesthetics. If the question is whether a six-lane interstate superhigh-
way at the gate of the zoo would provide audible and visual intrusions
incompatible with the setting and whether accordingly it would mini-
mize harm to the park for the highway not to be so visible and
audible, there is no reason to defer to FHWA’s expertise. FHWA
may be thought to have special competence on the question of whether
the alternative design can be built, but not on the question of whether
it would help the park.

Administration. Administrative Record, Certificate of Alan S. Boyd, former Secre-
tary of Transportation, Jan. 8, 1971, and letter from J.D. Braman, Assistant Secre-

105. FHWA assumed that the Overton Park interstate project would have mini-
mal effect on park values. For instance, the Turner Memorandum, supra note 103,
argued that “[t]he small, severed strip along the north side is already severed to
some degree by the existing bus roadway. Thus the area has little use . . . .” Turner
Memorandum, supra note 103, at 3.

106. An analogous situation has been adjudicated. At issue was a Corps of Engi-
neers project in which the Corps disagreed with the Fish and Wildlife Service of
the Department of the Interior as to the impact of the project on fisheries, and with
the Bureau of Outdoor Recreation of the Department of the Interior as to the recrea-
tional benefits of the project. The court stated:

Congress did not intend that a federal agency consult with another agency
‘which has . . . special expertise with respect to any environmental impact in-
volved’ and then have its comments . . . ignored. . . . With all due respect to the
experts acquired by the Corps of Engineers to work in the environmental sec-
tions . . . , their duties cannot include their substitution for the expertise of
other federal agencies charged with primary duties relating to the environ-
ment. . . . When a conflict arises between the Corps and an agency which is
making an evaluation in its particular field of expertise, and when the Corps’
evaluation is based upon factors of which the reviewing agency may take cogni-
zance, then NEPA obligates the Corps in most instances to defer to that evalua-
tion. Only upon the presentation of clear and convincing evidence that the re-
viewing agency was incorrect in its assessment should the Corps adopt another
evaluation; even so, this refusal to defer should not occur until after the review-
ing agency has had the opportunity to review the Corps’ claimed evidence, and
possibly reverse or modify its original evaluation.


A similar problem can arise over the threshold question whether the land
to be used for a transportation project is protected under section 4(f). If, for in-
stance, a highway is proposed to be routed through a public boat marina, there
might be a difference of opinion between FHWA and the Bureau of Outdoor Recrea-
tion as to whether such a facility is a “recreation area.” Presumably the Bureau
would claim expertise as to “recreation.”
b. That the proposed changes would be too costly.\footnote{107} The lower courts emphasized the Government’s allegations that a bored tunnel would cost about $107 million and a cut and cover tunnel would cost $41.5 million, as compared with $3.5 million for the design proposed by the State Highway Department and approved by FHWA.\footnote{108} As of the time of the Supreme Court’s opinion, however, there had been essentially no discussion of two critical cost issues: first, the cost of the third alternative, under which the road would have been depressed throughout the park, with discontinuous platform lids;\footnote{109} and second, why any of these costs would make a more protective design not “possible” for purposes of section 4(f).

The Government relied on this difference in cost, between $107 million and $41.5 million for tunnels and the $3.5 million for the proposed design, as being determinative on its face. The Government’s argument was apparently intended to imply that an extra

\footnote{107. “It would, of course, be engineeringly possible to construct such a tunnel, but it would not be reasonably productive of benefits equal to the cost nor would it be a reasonably prudent expenditure of public funds for the changes brought about in the park itself.” Turner Memorandum, \textit{supra} note 103, at 1. “This concept was considered as not being reasonably productive of benefits equal to the cost nor a prudent expenditure of public funds.” FHWA Report, at 1, forwarded on October 14, 1969, its date of publication, to Secretary Volpe by Administrator Turner’s office. This emphasis by FHWA engineers on non-statutory subjective criteria, instead of the section 4(f) requirement for “all possible planning to minimize harm,” permeates the entire Administrative Record.

It is particularly interesting to note in this connection, that in 1973, after three years of litigation in which the Government consistently dismissed the concept of tunnelling, Secretary Volpe finally decided, on remand: “Apart from alternative locations, I am also convinced that a tunnel design would be less harmful to the park than the present design.” Secretarial Decision on I-40, \textit{supra} note 98.

\footnote{108. Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F. Supp. 1189 (W.D. Tenn.), \textit{aff’d}, 432 F.2d 1307 (6th Cir. 1970). Later, in its presentations to Secretary Volpe, FHWA adopted a more limited concept of the relevant “proposal,” by excluding the cost of work at the ends of the project, so that the base cost of the proposal, for purposes of comparison with the costs of design improvements, became $1.1 million rather than $3.5 million. Administrative Record, Report by FHWA Office of Right-of-Way and Location, Oct. 14, 1969 [hereinafter cited as FHWA Report]. While this may have been intended to focus on the specific stretch of road which would have been affected by the alternate design proposals, its effect was to make the ratio between the proposed cost of the project and the estimated cost of design improvements even more unfavorable to plaintiffs. See note 67 \textit{supra} for other examples of manipulation of the scope of a “project,” and expressions of judicial disapproval thereof.

\footnote{109. The Administrative Record which was made available after the Supreme Court opinion contains FHWA materials which indicate that a fully depressed line without cover would cost between three and six million dollars extra, depending on the need for and costs of making the section “waterproof and non-buoyant in the area of the Lick Creek Siphon.” Administrative Record, FHWA Report on I-40, encl. 3, Oct. 23, 1969.}
cost for parkland protection makes such protection not "possible" for one or both of two reasons: that in absolute terms an extra cost of $36 million or more is necessarily too much; or that, comparatively, the extra cost is thirty times, or eleven times, as much as the cost of the basic project without such additional protection, and that such a ratio is necessarily excessive.

It is not clear, however, that an increment viewed in either light should amount to a self-evident condition of "impossibility" for purposes of section 4(f) without further analysis as to why the design, even at the incremental cost, is not "possible." Even if an inference of such impossibility would be proper in some case, the record in Overton Park, at the time of the remand by the Supreme Court, did not establish the context in which such an unreasoned disqualification of design improvements would be plausible on grounds of cost alone. One defect was in the concept of the relevant base for comparison. The $3.5 million for the proposed project was not the cost of I-40, or even the cost of bringing I-40 through Memphis; it was merely the cost of the limited "project" to be contracted. Interstate highways cost in the order of $1- to $2 million per mile in open country, and in the order of $15 million to $20 million per mile, sometimes more, in urban areas.\(^{110}\) I-40 therefore represents an investment of billions of dollars from North Carolina to California.\(^{111}\) The relatively minor portion of its costs in Memphis alone will probably amount to about $60 million to $80 million.\(^{112}\) Frequently, there are two or more interstate freeways in a metropolitan area. The total cost of Interstate highways in a city may well be in the upper nine figure range;\(^{113}\) four interstate highways in the Memphis metropolitan area may amount to about $300 million.\(^{114}\) The question whether

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\(^{110}\) Conversations with Mr. Rex I. Wells, FHWA Office of Right-of-Way and Location, who later became Chief, Environmental Development Division. Mr. Wells has no responsibility for any of my views.

\(^{111}\) Interstate 40 is to stretch "about 2,348 miles." DOT Press Release 24069 (Nov. 5, 1969).

\(^{112}\) See note 110 supra.

\(^{113}\) The proposed east-west Interstate system through Baltimore, for instance, is estimated to cost in the order of a billion dollars for 22 miles of urban highways. Statement of Mayor William D. Schaefer, Hearings on Proposed 1972 Highway Legislation Before the Subcomm. on Roads of the Senate Comm. on Public Works, 92d Cong., 2d Sess. 727 (1972). The Baltimore proposals, however, may also involve certain section 4(f) difficulties, and were described by Secretary of Transportation John A. Volpe on May 10, 1972 as among "projects that just may never be built, because of the tremendous . . . environmental and human and social damage that would be done. . . . [P]rojects where I doubt seriously we are going to resolve these problems." \textit{Id}. at 155-56.

\(^{114}\) See note 110 supra.
any given amount is so outlandish an expenditure for parkland protection as to be not “possible” would appear to require a comparison of the total amount suggested for extraordinary amenity protection in the metropolitan region with the total amount to be spent for interstate highways in that region. For example, in a city where the total cost of interstate highways amounts to $300 million or more and where a prime park is involved, an additional expenditure of $60 million for tunnelling may not be so excessive as to be not “possible.” Furthermore, an additional cost of three to six million dollars for a totally depressed road (the third alternative) might be absurdly small even in comparison to the cost of I-40 in Memphis. For all the record shows, however, the third alternative might be feasible at such a cost.\textsuperscript{116} The practice of state highway departments, however, has been to disqualify such an amenity investment as not “possible” since it amounts to eighty-five percent extra on the “project,” disregarding the percentage of incremental investment in a broader and more relevant context. Such practice is generally supported by FHWA. Since interstate projects are expensive, and since FHWA pays only ninety percent, the remaining ten percent to be borne by the state can loom large for a state highway department. Depending on the politics of the area, the highway department might prefer to spend $300,000 in widening and resurfacing three miles of a rural route than for the state’s ten percent share of a $3 million Interstate design improvement in order to preserve an urban park. Whatever the merits of such a preference, the legal issue under section 4(f) is whether the planning to minimize harm to a protected park is “possible,” not whether the planning is preferable in view of a state highway department or FHWA.\textsuperscript{116} It is therefore important, if costs are to be given any weight, that courts carefully scrutinize the relationships between the projected costs for design improvement and the costs of a reason-

\textsuperscript{115} See notes 109 \textit{supra} and 119 \textit{infra}.

\textsuperscript{116} The use by DOT of criteria other than those specified in section 4(f) has been severely criticized, particularly with respect to the requirement that there be no “feasible and prudent” alternative to the route. See Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), \textit{cert. denied}, Fugate v. Arlington Coalition on Transp., 409 U.S. 1000 (1972), which concerned the illegality of the use of parkland for highway purposes based on the preferences of federal or state officials formed on criteria other than whether feasible and prudent alternatives exist. See also District of Columbia Fed’n of Civic Ass’ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), \textit{cert. denied}, 405 U.S. 1030 (1972) which concerned the impropriety of permitting the “extraneous pressure” of a congressman, who had threatened to “do everything that he could to withhold Congressional appropriations for the District of Columbia rapid transit system” unless the Secretary approved plans for the Three Sisters Bridge, to “intrude into the calculus of consideration upon which the Secretary’s decision was based.” \textit{Id.} at 1245–46.
ably comprehensively defined overall highway undertaking of which the "project" is a part. Otherwise there is a serious danger that necessary design planning will be eliminated on improper grounds, such as on state highway department and FHWA decisions that are based upon agency judgments of how much they are willing to spend for parkland protection, notwithstanding Congress' directives in section 4(f).117

c. That the alternative designs are objectionable from an engineering point of view. FHWA contended, for instance, that the proposed design, involving an elevated crossing of Lick Creek, "... has been depressed as much as is reasonably possible." The problem lies in the meaning of the phrase "reasonably possible." If it means technically feasible, the reluctance of a court to adjudicate the issue would be understandable. Opponents of the proposed design contend, however, that there is no factual issue as to the feasibility of a more depressed design. Rather, they assert, FHWA would have to agree, if pressed, that a more depressed road could be built, at a cost.118 FHWA, it is argued, dismissed the alternative design as not "reason-

117. The same kind of judicial attention to cost relationships which is suggested here in connection with design questions may also be needed in connection with location questions [discussed in the text at part III C1 supra] if the agency has relied on the costs of alternatives to justify the contention that alternatives are not "feasible and prudent." In both cases, of course, the cost of the design improvement should be compared with the value of the park benefits it may bring, as well as with alternative construction costs.

118. Administrative Record, Memorandum from F.C. Turner, FHWA Administrator, to John A. Volpe, Secretary of Transportation, Aug. 18, 1969. Two months later FHWA concluded that it "is possible to lower the profile by as much as four feet at one particular place and to generally lower it about two feet ... ." Administrative Record, Memorandum from Acting FHWA Administrator Holmes to John A. Volpe, Secretary of Transportation, Oct. 23, 1969.

119. FHWA has, indeed, estimated the cost of such construction at various times. See, e.g., Administrative Record, Memorandum from Acting Chief, Environmental Programs Division (OST) to Assistant Secretary for Environment and Urban Systems, Aug. 11, 1969, referring to a conversation of April 22, 1969 with two responsible FHWA engineers, D.W. Loutzenheiser and T.G. Hasemeier, who said "there would be engineering difficulties in depressing the road at Lick Creek, but that it could be done at a price." They estimated that the price could be two to four million dollars more than the cost of not depressing it, "depending on the difficulties which were encountered." There were also estimates for a fully depressed road without covers, in FHWA Report on I-40, encl. 3, Oct. 23, 1969, note 109 supra, and Affidavit of John A. Volpe, July 15, 1971 which stated: "... I was informed that, in order to depress the highway below Lick Creek, an inverted siphon would have to be installed together with mechanical pumping equipment for the removal of highway drainage. These requirements would more than double the cost of this highway section" (emphasis added). The amount which would be more than doubled is not specified; but apparently the base in question is only about a million dollars. This figure which was adopted in the FHWA administrative analyses, represents the cost of the "section," a smaller stretch than the "project." See note 107 supra.
ably possible” because it did not regard the cost which would be necessary to solve engineering problems as reasonable, and not because the engineering problems were in any way unsolvable. In the absence of a clear articulation of the criteria by which this judgment was made, it is difficult to determine whether FHWA's concept of the “reasonably possible” accords with section 4(f)’s requirements for “all possible planning to minimize harm.” Without careful inquiry it is impossible to know whether the objection is really based on engineering grounds or on administrative choices as to the amount which should be spent for purposes of section 4(f). If, for instance, a fully depressed road

120. Certain specific technical problems in connection with a fully depressed route are identifiable in the opinions and Administrative Record. It is, however, nowhere stated by FHWA that these problems appear unsolvable at a predictable price. Instead, the record suggests that the engineering objections were not originally FHWA objections, but rather objections of the city of Memphis. See Administrative Record, Memorandum from F.C. Turner, FHWA Administrator, to John A. Volpe, Secretary of Transportation, Aug. 18, 1969 which states:

While this concept [referring to the environmentalists' suggestion that the road be completely depressed] is possible, the city is adamantly opposed. Should the drainage be pumped, the city's concern is with possible power failure, which has already occurred at a similar installation elsewhere in Memphis. They are also opposed to an inverted siphon because of its many unusual maintenance problems, together with its hazard to human and animal life, and of possible health hazard and nuisance due to stagnant water.

Id. at 3 (emphasis added). It later developed that “[i]t is Tennessee policy that the State Highway Department maintains and operates all Interstate highways, including urban sections. Operations for drainage of depressed section would be a state and not city responsibility.” Administrative Record, Memorandum from Acting FHWA Administrator Holmes to John A. Volpe, Secretary of Transportation, encl. 1, Oct. 23, 1969. Ultimately Secretary Volpe discussed these problems as if they were his own concerns, rather than the city's, but was not at all clear whether he was asserting engineering objections which could reasonably justify the contention that such objections rendered the proposed design improvements not “possible.” “[P]ower failures — during severe storms, for example — would render the pumps inoperable and cause dangerous flooding . . . . [A]n inverted siphon would create unusual maintenance problems, and would be a possible health hazard and nuisance because of stagnant water . . . .” Administrative Record, Affidavit of John A. Volpe, July 15, 1971 (emphasis added). This affidavit was prepared in response to the Supreme Court's determination in Overton Park that previous affidavits prepared in connection with the litigation were “merely 'post hoc' rationalizations . . . which have traditionally been found to be an inadequate basis for review.” 401 U.S. at 419. It does not, however, squarely address the question whether engineering remedies could be provided — for example, whether emergency motor-generator units could provide stand-by power for the drainage pumps in event of power failure, and, if so, at what cost; whether the “unusual” maintenance problems would be unthinkably expensive, or merely “unusual” but inexpensive, such as periodic inspections and waste removal; or whether, similarly, the “possible” health hazards and nuisance could be avoided by a relatively simple, albeit “unusual” maintenance program. The record is consistent with either the proposition that a serious engineering decision, appropriate to a finding of “not possible,” was made by FHWA and the Secretary, or the proposition that it was not, in that the record is
could be built for an extra expenditure of $3 to $6 million dollars and if the total cost of bringing I-40 across Memphis were $60 million, the question whether the alternative design constitutes an element of "all possible planning to minimize harm to the park" becomes a matter of statutory construction. Such consideration must take into account the views of parkland experts as to value of such planning to the park, and not FHWA's engineering expertise as to what is "reasonably possible."121

devoid of specific attention to the basis for the conclusions put forward by defendants. Nevertheless, on remand the district court determined that:

[T]he Secretary could have reasonably believed that the design he approved constituted all that was reasonably possible to minimize harm to the park and that, basing his decision on the relevant factors and weighing them in the light of the requirement that all reasonably possible be done to protect the park, his decision that the design met this test was not arbitrary or capricious or a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873, 883 (W.D. Tenn. 1972) (emphasis added). On such reasoning the mere assertion of a possible objection related to engineering considerations would essentially immunize FHWA from judicial review of any determinations concerning the "all possible planning" requirement of section 4(f), since the court assumes that the term "reasonably possible" is so clear that the agency can be trusted to apply such a standard without searching inquiry by the court as to what the agency thinks the formula means.

121. The dissenting opinion of Circuit Judge Celebrezze concerning the Overton Park factual issues stated:

[P]ublic parklands are the only remaining weekend sanctuaries for vast numbers of city dwellers from the polluted urban sprawl. A threat to a neighborhood parkland is a threat to the health, happiness, and peace of mind of all the neighborhood people. Congress recognized this fact . . . . Obviously, the federal courts do not have the technical expertise of roadbuilders, and they should never interfere in the technical processes of building roads. It is our solemn responsibility, however, to insure that those with technical expertise exercise it in accordance with the laws of the United States and the public welfare."

Citizens to Preserve Overton Park, Inc. v. Volpe, 432 F.2d 1307, 1318 (6th Cir. 1970). For an interesting parallel in British administrative law, see Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997, particularly Lord Upjohn's opinion at 1060 concerning the Minister's discretion under an Act that required certain steps "if the Minister in any case so directs" [Id. at 717] or "if he thinks fit to do so." Id. The opinion considered whether that discretion was, as the defendants asserted, "unfettered." After noting that such an adjective did not appear in the statute he commented:

Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasize what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that it is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon a minister rather than by the use of adjectives.

Id. at 719. For recent American discussions of the need for judicial control over agency discretion, see Sofae, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 COLUM. L. REV. 1293 (1972); Wright, Book Review, 81 YALE L.J. 575 (1972), and references cited therein.
3. "Publicly Owned"

Public parks, recreation areas and wildlife and waterfowl reserves, but not historic sites, must be "publicly owned" before the requirements of the last sentence of section 4(f) (". . . the Secretary shall not approve the use of any land . . . ") apply. Questions can arise about such lands which are owned by non-profit public interest organizations, as for instance Audubon Society bird sanctuaries, or park-like scenic areas owned by the Nature Conservancy and open to the public.

In 1968, draft regulations were prepared in the DOT General Counsel's Office for the implementation of section 4(f). Those drafts would have defined "publicly owned" lands to include lands owned by non-profit organizations and dedicated to uses on behalf of the public. The regulations were never issued, for reasons which had nothing to do with this interpretation.

Whether or not DOT would interpret "publicly owned" the same way in the future, the lands in question would qualify for some protection, if only under the first sentence of section 4(f). The Secretary would presumably be obliged under that sentence to make "a special effort" to save Audubon Society and Nature Conservancy lands from federal-aid highway encroachment, even if they were not considered "publicly owned." In such case a question could arise whether his discretion is as limited under the "special effort" clause as it is, in the case of "publicly owned" lands, where he is governed by the last sentence of section 4(f) as construed in Overton Park. The statutory language appears less rigorous in the former case than the latter. Yet it may be difficult for the Secretary to show even a "special effort" unless he can demonstrate some consideration of the factors applicable to the use of "publicly owned" land, that is, the feasibility and prudence of alternatives and the sufficiency of the planning to minimize harm. If he attempts such consideration he will confront the same analytic challenge which the Court faced in Overton Park. Whether parkland is publicly owned or not, it will almost always be cheaper and less disruptive socially to use it than to use developed land outside the park. If the Congressional directive has any purpose, it must be to attach a weighted preference to the favored values specified for protection, and not merely to treat cost and disruption ". . . on an equal footing with preservation of parkland . . . ." Therefore, it would

122. See note 48 supra.
123. See text following note 52 supra.
124. 401 U.S. at 412. The quantum of preference which must be accorded protected lands may theoretically be smaller under "the special effort" requirement in the first sentence of section 4(f), than under the Overton Park criteria for establishing the absence of "feasible and prudent" alternatives under the third sentence. The
appear that something like “paramount importance” must be given to non-publicly owned protected lands as well as to those which are publicly owned, if the “special effort” requirement of the first sentence of section 4(f) is to be satisfied. If this is the case, the Secretary may as well treat Audubon Society and Nature Conservancy lands in general as “publicly owned,” and refuse to support state highway department projects involving their use, except in circumstances essentially similar to those in which such use could be justified under the Overton Park tests.

4. “The Significance Requirement”

All categories of land protected by the last sentence of section 4(f) — historic sites as well as public parks, recreation areas and wildlife and waterfowl refuges — must be “of national, State, or local significance as determined by the federal, State, or local officials having jurisdiction thereof.” Again, as in the case of the “publicly owned” condition, this qualification does not apply to the “... special effort ...” requirement in the first sentence of the section.

When this provision was enacted as part of the 1968 amendments to Section 4(f), it was at first feared by some conservationists that it tended to undermine section 4(f) by assigning to local authorities the discretion whether to apply the protection of section 4(f). These fears were stimulated by the misleading explanations in the Statement of the House Managers.125

The gloom was not justified. The section does not leave to local, or to any other officials, discretion as to whether eligible lands should be protected. It deals solely with the identification of the eligible lands, and is useful in proportion to the strength with which the rest of the provision is interpreted.

The tougher the prohibitions against the use of protected lands, the greater is the need for a mechanism for excluding environmentally useless lands from the coverage of the prohibition. There are many cases of such useless lands. They would include small islands and strips of abandoned or forfeited property which are under the jurisdiction of local park authorities for maintenance purposes but which have no scenic or recreational importance, and obsolete recreation property in areas of changing land use which are no longer near residential areas. If the costs and disruptions of alternative routes around such worthless land were required to be “truly unusual” and of “extraordinary practical effect of any such difference, however, is conjectural given the imprecision with which such values are subject to quantification.

125. See notes 42-45 supra and accompanying text.
magnitudes' to meet the Overton Park tests, section 4(f) would be quickly discredited in the minds of an outraged public. It would make no sense to condemn good housing in order to avoid a route through an open space eyesore if the land is neither needed nor suitable for park or recreational development.

There might have been a serious problem in the protection of valuable lands if the significance requirement had been interpreted as a condition precedent, requiring formal determinations of significance as a prerequisite to the application of section 4(f). Fortunately, no such triggering has been demanded, at least with respect to protected lands other than historic sites. Significance is assumed to have been determined by local or other officials who provide funds for the maintenance of publicly owned parks, recreation areas and wildlife or waterfowl refuges, on the reasonable inference that otherwise they would not spend public funds on the lands.¹²⁶ Formal determinations are accordingly used in section 4(f) practice to verify that an example of one of these categories of land is not "significant," rather than to establish that it is significant.¹²⁷ While city councils are willing to resolve that

¹²⁶. See, e.g., Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1336 (4th Cir.), cert. denied, Fugate v. Arlington Coalition on Transp., 409 U.S. 1000 (1972), where the court stated: "... land used as a public park is presumed 'significant' unless explicitly determined otherwise ... by the appropriate federal or local officials."

¹²⁷. Cf. Pennsylvania Environmental Council v. Bartlett, 454 F.2d 613 (3d Cir. 1971) (semble), upholding an administrative determination that section 4(f) is not applicable because of a finding by a state deputy attorney general that the lands in question were forest lands which had "not been set aside for park, wildlife interests or recreation . . . ." Id. at 622-23. Compare Pennsylvania Environmental Council with the Coast Guard's treatment of the Goleta Slough as qualifying de facto for section 4(f) protection [note 64 supra and accompanying text], as to the need for the lands to be "set aside" for the designated purposes. See also Arizona Wildlife Fed'n v. Volpe, 4 ERC 1637 (D. Ariz. 1972), in which a forest highway project was enjoined because of failure to comply with section 4(f). The road would have run through lands which the court found as a fact to be "an area of national forest land which is a unique and significant recreational area." The United States Forest Service, which had jurisdiction over the lands, had stated that "[n]o proclaimed recreation areas are invaded by the proposed project," [Id. at 1638] but had not determined "whether this is or is not in fact a use of a recreational area of national, state or local significance located on publicly owned land." Id. The court concluded, "interpreted as a 4(f) finding of lack of significance, the statement of the Forest Service reflects a clear abuse of discretion, an error of judgment, a failure to follow the law." Id.

The Third Circuit further stated in Pennsylvania Environmental Council that the Secretary is "not only entitled but even obliged, to accede to . . . [the local official's] ruling . . .." 454 F.2d at 623. This may overlook the Secretary's broader authority under the "special effort" clause, which does not have the same "significance" requirement. In the event, moreover, that the authority of the local official to make a finding of non-significance is challenged, it has been held that defendants have the burden of proving the authority so challenged, Lathan v. Volpe, 350 F. Supp. 262, 268 (W.D. Wash. 1972). Local findings of non-significance sometimes appear
roads through parks are essential, no city council has yet dared to declare that a park currently in important use is not significant.

Local authorities may be prepared, however, to certify that part of a park is not significant, although the park as a whole is a significant one. Such a declaration may not be responsive to the requirements of the section, which appears to prohibit the use of "any publicly owned land" from parks, etc. of "significance." For the same reasons, however, that make it desirable to exclude non-significant lands from the coverage of the last sentence of section 4(f), a method should be available for treating non-significant areas within significant parks differently from the standards set out in Overton Park. It should not be necessary to prove that the costs of an alternative are extraordinary in order to justify use of unimportant fragments. At the same time great care is necessary to prevent creeping intrusions into significant parks. It might be sensible, therefore, to require a full section 4(f) in airport situations as well as in the case of highways. The Board of Commissioners of Dade County, Florida, for instance, passed such a resolution with regard to Thompson Park on July 25, 1972. Thompson Park is in an area proposed for development of a jetport as an alternate to a controversial training airport which has already been built near the Everglades National Park. Thompson Park is used for campers' facilities, including trailer parking. It was opened late in 1966 at an initial cost of over $218,000. The Commissioners resolved that "the Thompson Park camp site facilities are not unique and can be replaced at another location ... which would be equal to or superior than the present location" and that "the present site of the Thompson Park campsite facilities is not of local significance within Section 4(f) of the Department of Transportation Act." Dade County Port Authority, South Florida Regional Airport Site Selection Study Program: Preliminary Environmental Impact Statement, at 131, 133 (Oct. 1972).

128. On February 24, 1970, for instance, the Harrisburg, Pennsylvania City Council passed Resolution 20-1970, stating that "the portion of the area known as Wildwood Park required for [highway purposes] has never been developed for park or recreational purposes, and the City has no plans for the development thereof ..." It further stated that "the City of Harrisburg did not and does not consider the particular area heretofore conveyed to the Pennsylvania Department of Highways to be necessary or significant for future development for park or recreational purposes." Secretary Volpe nevertheless "determined to treat the proposed highway facilities as falling under the provisions of the section ..." Instead of suggesting that the local determination of non-significance was invalid because it applied only to part of the park, he relied in part on the fact that the Department of the Interior, through its Bureau of Outdoor Recreation, had "... taken sufficient interest in Wildwood Park to suggest worthwhile changes in the design of the proposed highway facilities." He also questioned "whether a tract's significance for future development is identical to its 'significance' within the meaning of section 4(f)," and referred to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970), as an additional "mandate with respect to the preservation of scenic and recreational resources." Statement and Determination of John A. Volpe Secretary of Transportation, on River Relief Route and I-81, Harrisburg, Pennsylvania, May 18, 1970, discussed extensively, and found ambiguous, in Harrisburg Coalition Against Ruin. Envir. v. Volpe, 330 F. Supp. 918, 933 (M.D. Pa. 1971).
evaluation whenever any part, no matter how insignificant, of a significant park is to be used, but to permit the Secretary a wider area of discretion than that allowed in an Overton Park situation as to the prudence of alternatives when the invaded area is not significant.

Historic sites present special problems. Unlike the other protected lands they need not be publicly owned. When they are not publicly owned, no presumption of a determination of significance can arise from the fact of public maintenance since normally only publicly owned property is publicly maintained. It is, on the other hand, customary for historic sites to be designated as such by someone such as a local or state landmarks commission, or by the United States Department of the Interior. Any such designation is presumably equivalent to a determination of significance for purposes of section 4(f).

The determination may be made by any of the local, state or federal officials who can claim to have "jurisdiction thereof." For these purposes "jurisdiction" may refer to more than merely political authority, although governing bodies having general jurisdiction over the land in question would be able to trigger the application of the last sentence of section 4(f) by declaring their determination of the significance of land which they wish to protect. An agency which is authorized to decide that properties have historic importance may be regarded as having "jurisdiction" over determinations of historic significance. Some properties, for instance, are listed by the Secretary of the Interior in the National Register of Historic Places. It is inconceivable that a National Register property could be regarded as ineligible for protection under section 4(f), regardless of whether it was considered "significant" by the local or state governing bodies having political jurisdiction over the property. A similar triggering function may inhere in a local or state historic society, if it has official status to designate landmarks. It might also be found in a state parks or recreation commissioner with respect to local parks which he has the authority to classify for state purposes, although they may not be under his administrative control.

D. The Limits of Judicial Review: Timing and Scope

1. Timing

Elsewhere in this article a question of timing is discussed as to how early in the planning process section 4(f) should be applied.129

129. See note 77 supra.

130. See text section IIIA supra.
A separate question arises in terms of how late in the planning process is too late to obtain judicial review, particularly with regard to highway projects which were well advanced before the effective date of section 4(f). 131

The difficulties in this question have been exacerbated by four complicating historical factors. First, highways are often planned decades ahead of anticipated requirements. Litigation arising since 1967 concerning construction contracts let since the effective date of section 4(f) typically involves undertakings based on key decisions made prior to the enactment of section 4(f). 132 Second, the concept of the Secretary's approval was not a term of art before section 4(f). Third, the drafters of section 4(f), working through the Government Operations Committees rather than the Public Works Committees of the Congress, were not expertly familiar with the terminology or processes of the federal-aid highway program, 133 and therefore did not draft with explicit reference to the procedures of that program. And fourth, additional "approval" procedures related to environmental planning have become formalized since the enactment of section 4(f) under requirements other than those of section 4(f), and similar questions as to timing applicable to such additional procedures may influence the answers to timing questions under section 4(f).

A further complication is bibliographic. The procedures of the highway program have not been readily accessible to legal researchers because the relevant documents have been deliberately withheld from publication, apparently in order to minimize the opportunity for interference with highway programs by non-members of the highway construction community. 134 A statutory scheme is, of course, available in Title 23, 135 but the working jargon of the federal-aid highway program reflects an intricate web of interactions between FHWA field personnel and state highway departments barely suggested by the legislation. 136

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133. See text accompanying note 18 supra.
These processes are outlined in a series of orders and memoranda, some called FHWA orders, some called Administrative Memoranda ("AMs"), some called Instructional Memoranda ("IMs") and some referred to as Policy and Procedure Memoranda ("PPMs"), which are usually not published in the Federal Register or the Code of Federal Regulations but are instead circulated privately within the highway program. A bewildering sequence of federal "approvals" is provided in these procedures, which may have given state planners reason to consider FHWA at least morally committed to a number of key decisions which were made before the enactment of section 4(f) and which have since been reopened.

In a section 4(f) challenge, defendants in highway cases frequently assert that the project was sufficiently advanced before the effective date of section 4(f) so that section 4(f) does not apply; that the project is so advanced as of the time of trial that changes are not "feasible," "prudent," or "possible" within the meaning of those terms as used in section 4(f); or alternatively, that the project was so advanced before suit was brought that plaintiffs should be barred by laches.

On the first question, that of whether the project is exempt from section 4(f) because of the project's state of development before the enactment of section 4(f), the courts have split. Since the operative language of the second sentence of section 4(f) turns on the verb "approve" ("... the Secretary shall not approve any program or project..."), it can be argued that the applicability of section 4(f) depends on whether the program or project had already been "approved" before the effective date of section 4(f). If this approach is taken, the further question arises as to which "approval" is determinative. In the case of interstate highways, for instance, Title 23 calls for approval of "the routes of ... [the] system"; the ... Interstate System" or any "portions thereof"; the fiscal year "program" of proposed federal-aid highway projects of each state highway department; "[s]uch surveys, plans, specifications, and estimates for each proposed project ..." (the "P, S & E approval"); the construction con-

137. Since April 1970, indices to these documents have been available from the Office of the Records Officer, FHWA, Seventh and E Streets, S.W., Washington, D.C. 20591, and copies have been available for inspection at facilities listed in Appendix D of Part 7 of Title 49, Code of Federal Regulations. See 23 C.F.R. § 1.32 (1972).
139. Id. § 103(f).
140. Id. § 105.
141. Id. § 106(a).
tract, and the construction itself. Other approvals, required by regulations to be interspersed among the statutory approvals, include "corridor" and "design" approvals.

The Third Circuit has stated that "[t]he date of design approval is critical to the application of the statutes ..." which were at issue in *Wildlife Preserves, Inc. v. Volpe*, one of which was section 4(f). By "design approval" the court appeared to have meant the approval of "essentially complete contract drawings," which the court held antedated section 4(f).

On the other hand, it can be argued that "design approval" was not a term of art at the time of the enactment of section 4(f), and that this concept is more relevant to the requirements of PPM 20–8 concerning public hearings, which was also at issue in *Wildlife Preserves*.

The Fifth Circuit, ruling for the plaintiffs in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, similarly stated that the date of the "Secretary's ap-

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142. Id. § 112.
143. Id. § 114.
146. Id. at 1274.
147. *Id.* at 1277. This would appear to be essentially the same as P,S&E approval. See note 141 supra and accompanying text. But cf. Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S. D. Iowa 1972), where it is stated that "design approval" was received on March 25, 1969 but plans, specifications, and estimates had not been approved as of August 4, 1972. *Id.* at 1171.
149. 446 F.2d 1013 (5th Cir. 1971).

This litigation grew out of the proposal by the Texas Highway Department to build a highway through the Brackenridge — Olmos Basin Parklands in San Antonio, note 23 supra. The San Antonio Conservation Society filed suit in late 1967. At first the action remained dormant for nearly three years, because there was no final federal approval of the project until August 1970. During this time the Department of Transportation unsuccessfully attempted to reach agreement with the Texas Highway Department, on design changes, originally, and then on an arrangement for a study of alternatives to the park route. Finally it was agreed, without notice to plaintiffs, that work could begin on the northern and southern end "segments" of the "project," outside the parks, but that alternative locations for the center link would be studied. Plaintiffs moved for interlocutory relief; they were
proval [of the project for federal funding] ... [is] the operative date for determining what law should apply in this case.” Presumably this was the date of PS & E approval under 23 U.S.C. § 106, although the approval is not specifically identified in statutory or regulatory terms in the opinion. This ruling, that the project was not exempt from section 4(f) on grounds of prior “approval,” was made in the context that such approval by the Secretary did not come until 1970. The San Antonio ruling is accordingly not necessarily inconsistent with the position that the project may have been subject to section 4(f) because of the non-occurrence, prior to the effective date of the section, of other events as well.

The Fourth Circuit has supplied an alternative rationale. In Arlington Coalition on Transportation v. Volpe the court stated:

Date of approval ... is not the criterion for applicability, because according to this criterion every project being built with federal funds would be subject to ... sections [4(f) and 23 U.S.C. § 138] since the Secretary’s “approval” extends through construction. We agree ... that Congress did not intend that all projects ongoing at the effective date of the Acts be subject to these sections. At

delayed, however, in the district court until after contracts had been advertised for bid and after the bids had been received and made public. The district court then granted summary judgment for defendants permitting construction of the end segments. The Fifth Circuit heard plaintiffs' motion for stay two days before the bids were to expire, and was told by defendants, incorrectly, that the delay had been plaintiffs' fault. The circuit court denied plaintiffs' motion for a stay on November 18, 1970. Construction contracts were awarded within two days, and a week after the decision, on November 25, the president of the San Antonio Conservation Society announced that his organization had withdrawn from the litigation. The case had been brought, however, in the name of the Society “and individual members thereof.” Some members, who disagreed with the decision to abandon the suit, decided to continue it on their own under the style “Named Individual Members of the San Antonio Conservation Society...” A petition for certiorari was denied over three dissents. Named Ind. Mem. of San Antonio Con. Soc'y v. Texas Hy. Dep't, 400 U.S. 968 (1970). Ten weeks later the Supreme Court handed down an important decision construing section 4(f), Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), note 96 supra and accompanying text. In light of that decision plaintiffs renewed their motion to stay on grounds that conditions had changed and that Overton Park compelled reversal of the previous San Antonio decision. The district court denied the new motion but the Fifth Circuit reversed, partly in light of Overton Park, and partly in reaction to proof that it had been misinformed by the defendants at the first hearing. That misinformation concerned the reasons for the delays as a result of which the court had been confronted with the imminent threat that the construction contract bids would expire within two days after the hearing. In fact defendants themselves had been responsible for those delays. 446 F.2d at 1018 n.11.

150. Id. at 1025.
some stage short of completion the costs already incurred in a project could so outweigh the possible benefits of altering or abandoning the proposed route to avoid using parkland or to minimize harm from the use that because of the stage of progress alone "no feasible and prudent alternative to the use" would exist and "all possible planning to minimize harm" would have been done. We disagree . . . , however, that because these sections are not applicable to some ongoing projects they are not applicable to all ongoing projects. Congress has declared through Sections 138 and 4(f) that conservation of parkland is of the utmost primary importance . . . [citing Overton Park]. Congress has also directed in Section 102 of the National Environmental Policy Act . . . that "to the fullest extent possible . . . public laws of the United States shall be interpreted and administered in accordance with the policies" . . . [of that Act]. We are compelled, therefore, to conclude that these sections are applicable to a project until it has reached that stage of progress where the costs of altering or abandoning the proposed route would certainly outweigh whatever benefits might accrue therefrom, and that doubts about whether this stage has been reached must be resolved in favor of applicability.152

The Fourth Circuit attempted to harmonize those views with those in San Antonio and Wildlife Preserves on grounds the implications of which are not entirely clear. It pointed out that, in Arlington Coalition, "parklands have not been acquired, P.S. & E. approval has not been given, construction contracts have not been awarded, and construction on the highway itself has not begun."153 Since none of these steps had been taken as of the time of the appellate decision in 1972, they clearly had not been taken as of the effective date of section 4(f). The prior "approval" on which the district court had relied in upholding defendants was an authorization by federal authorities for the acquisition of the right-of-way through the parkland.154 At the time of the appellate opinion the parkland had not yet been conveyed to the highway department, but instead was still used as a park.155

On the facts of Arlington Coalition the Fourth Circuit could have ruled with the Fifth Circuit that the date of PS & E approval was determinative,156 and still have upheld plaintiffs. Similarly, if "design approval" in Wildlife Preserves was, on the facts of that case, essentially

152. Id. at 1335.
153. Id.
154. Id. at 1334 n.3.
155. Id. at 1327, 1335.
156. See note 44 supra.
the same as PS & E approval, the Fourth Circuit could have based its decision on the Third Circuit's rationale. Instead the Fourth Circuit, apparently, attempted to harmonize San Antonio with the observation that in that case also neither PS & E approval, construction contracting, nor actual construction had occurred as of the effective date of section 4(f). This suggests that the Fifth Circuit need not have rested on the narrow ground of lack of "approval," but could have instead used the Fourth Circuit's test, that the project had not "reached that stage of progress where the costs of altering or abandoning . . . [it] would certainly outweigh whatever benefits would accrue therefrom . . . ."

The Fourth Circuit had more difficulty in attempting to minimize its difference with the Third Circuit. It distinguished Wildlife Preserves on the ground that the "factor determining applicability in that case . . . was the stage of completion of the highway; construction contracts had been awarded and construction had begun." In Wildlife Preserves, however, construction had not been contracted or begun before the enactment of section 4(f), but rather in 1969 before the trial. It is entirely clear that the Third Circuit relied solely on "design approval" alleged to have been completed before the effective date of section 4(f), as the determinative date for the exemption of a project from section 4(f).

Assuming then a difference of opinion between the Fourth and Third Circuits as to which stage must have been reached before the effective date of section 4(f) in order to exempt a project, a number of questions remain concerning the Fourth Circuit's views. The court does not say whether it would be sufficient if the construction contract had been let, but work had not begun, before the effective date. Presumably, however, it would still be possible the day after a contract is signed that the value of improvements would outweigh their costs, if such a possibility were clear the day before the same contract is signed. In the absence of evidence as to the added costs resulting from the mere existence of the contract, there is not an a priori basis for considering such added costs decisive. It is similarly not clear whether commencement of actual work should, under the Fourth Circuit formula, foreclose the applicability of section 4(f), since, again, the "costs already incurred in a project" might still not "certainly outweigh whatever benefits might accrue" from a change.

157. 458 F.2d at 1335.
158. Id.
159. Id.
161. Note 145 supra.
In a somewhat analogous line of cases, relating to the applicability of the National Environmental Policy Act of 1969 ("NEPA") to projects ongoing at the time of its effective date, there has been a marked tendency by the courts to opt in favor of applicability, on the ground that Congress intended a maximum feasible effort to prevent unnecessary environmental damage. NEPA requirements for a detailed environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . ." could be distinguished from the second sentence of section 4(f) on the ground that they do not purport to turn on a procedural event like a Secretarial "approval." On the other hand the continuing spectrum of approval requirements under Title 23, as noted by the Fourth Circuit, provides a basis for injecting section 4(f) into the planning

162. Among NEPA’s procedural requirements, in addition to the detailed environmental impact statement, is the provision that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on man’s environment . . . ." NEPA § 102(2)(A), 42 U.S.C. § 4332 (1970). The failure to use such a "systematic, interdisciplinary approach" may, in addition to constituting a violation of NEPA, have a bearing on whether the Secretary has complied with the "special effort" and "all possible planning" requirements of section 4(f). Section 102 of NEPA also provides that . . . "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this [Act] . . . ." 42 U.S.C. § 4332 (1970).


In Environmental Defense Fund v. Tennessee Valley Authority, 4 ERC 1850, 1857 (6th Cir. 1972) the court stated:

[A]n agency must file an impact statement whenever the agency intends to take steps that will result in a significant environmental impact, [whether or not these steps were planned before . . . the effective date of the Act], and whether or not the proposed steps represent simply the last phase of an integrated operation most of which was completed before that date. Some cases provide for the applicability of both NEPA and section 4(f) to ongoing projects. See, e.g., Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1330–37 (4th Cir. 1972). A more restrictive view on whether NEPA should be applied "retroactively" is reflected in Pennsylvania Environmental Council v. Bartlett, 454 F.2d 613 (3d Cir. 1971) and Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972).


165. Note 152 supra.
process after the commencement of construction, if it would be beneficial to do so. The first sentence of section 4(f), which requires a "special effort" to preserve parks and other protected lands, is not by its terms keyed to approval actions and could well be read, in conjunction with NEPA, to require that doubts as to the applicability of section 4(f) be resolved in the interests of environmental protection whenever an alternate routing decision could still be "feasible and prudent," or whenever it is "possible" to "minimize harm" by a design change.

Similar considerations apply to the question of whether a section 4(f) review is foreclosed because of the stage of construction attained before suit is filed, or trial held, assuming that the requirements of the section should have applied to the project but in fact had not been met. It is recognized that completed construction may render alternatives no longer feasible or prudent, even if the same alternatives would have been feasible and prudent before the construction, and even if the construction itself is illegal because of non-compliance with section 4(f). At the same time, however, if there has been an illegal commencement of construction, a tendency is discernible to enjoin further work in order to obtain a section 4(f) review, in the interest of preserving protected lands which can still be saved.

If suit is not filed before the construction contract is let, or work commenced, defendants frequently assert the defense of laches. On

166. The Arlington Coalition court noted, referring to NEPA, that:

[F]urther investment of time, effort, or money in the proposed route would make alteration or abandonment of the route increasingly less wise and, therefore, increasingly unlikely. If investment in the proposed route were to continue prior to and during the Secretary's consideration of the environmental report, the options open to the Secretary would diminish, and at some point his consideration would become a meaningless formality.

458 F.2d at 1333. Addressing itself to the transportation legislation, the court further stated, "... suspension of work on Arlington 1-66 [is] ... necessary if the Secretary's determination under Sections 138 and 4(f) is to be meaningful; continuing investment in the project at its present state of development would render alternatives to use of the parks less feasible and prudent." Id. at 1336. In Stop H-3 Ass'n v. Volpe, 4 ERC 1684 (D. Hawaii 1972), where there was a stipulation by the parties that construction on a proposed road should be suspended pending the processing of a NEPA environmental impact statement, the court ordered that design work on the disputed segment should also be suspended, because otherwise, "the [design] contracts would involve the further expenditure of more than two million dollars [and] completion of these contracts would increase the stake which the state and federal agencies already have in the ... segment." Id. at 1685.

167. In San Antonio, for instance, after a long effort by plaintiffs which had been generally unsuccessful, work was finally stayed on May 27, 1971, although contracts had been let November 19 or 20, 1970, and "shortly thereafter construction . . . commenced." Named Ind. Mem. of San Antonio Con. Soc'y v. Texas Hy. Dept., 446 F.2d 1013, 1019 (5th Cir. 1971).
the whole the courts have been generous to plaintiffs in highway cases on this issue. Dismissals for late filing have been denied with the observation that laches is not merely a matter of the passage of time, but depends on the diligence of plaintiffs, that is, whether the delay was unconscionable,\textsuperscript{168} or sometimes, as in the view of the Fourth Circuit, because the courts "decline to invoke laches . . . because of the public interest status accorded ecology preservation by the Congress."\textsuperscript{169}

2. Scope of Review

The tension in section 4(f) litigation is between defendants' efforts to persuade the judiciary to defer to administrative expertise on decisions which are presented as questions of engineering, and plaintiffs' efforts to maximize the scope of review.

In \textit{Overton Park}\textsuperscript{170} the Supreme Court was faced with a decision by the Secretary of Transportation to permit a road through a park in the absence of formal findings by the Secretary on the issues covered by section 4(f). The Court held that formal findings were not necessary in this case, since they were required neither by statute nor by the regulations in force at the time of the decision\textsuperscript{171} (although a subsequent DOT regulation now requires such findings).\textsuperscript{172} The Court paid lip service to the concept that "the Secretary's decision is entitled to a presumption of regularity."\textsuperscript{173} It similarly rejected plaintiffs' contentions that the agency decision be set aside under the Administrative Procedure Act if it was not supported by "substantial evidence,"\textsuperscript{174} or that the Court provide a \textit{de novo} review and set aside the agency action as "... [u]nwarranted by the facts."\textsuperscript{175} The Court nevertheless stated


\textsuperscript{171} \textit{Id.} at 409.

\textsuperscript{172} DOT Order No. 5610.1 (Oct. 10, 1970).

\textsuperscript{173} 401 U.S. at 415.

\textsuperscript{174} \textit{Id.} at 414.

\textsuperscript{175} \textit{Id.}
that the presumption of regularity accorded the Secretary's decision "is not to shield his action from a thorough probing, in-depth review."\textsuperscript{176}

Among the matters to be decided is "[w]hether the Secretary acted within the scope of his authority," involving both "[a] delineation of the scope of the Secretary's authority and discretion," and consideration of "whether the Secretary properly construed his authority . . . ."\textsuperscript{177}

This issue is particularly significant since it is fairly clear that neither the Secretary nor any of his advisors construed section 4(f), before the Overton Park decision, quite the way the Supreme Court interpreted it.\textsuperscript{178}

The Court further stated that "the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems." It also required a determination that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," which is to include "consideration of the relevant factors and whether there has been a clear error of judgment." In addition inquiry may be made "whether the Secretary's action followed the necessary procedural requirements."\textsuperscript{179}

Having approved this potentially meaty scope of judicial review, the Court renewed its deference to reticence: "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."\textsuperscript{180}

The twin requirements for "a thorough, probing, in-depth review," and that "the ultimate standard of review . . . [be] a narrow one," can be reconciled if there is postulated a growing judicial skepticism about the "presumption of regularity"\textsuperscript{181} in cases where there is room for doubt as to whether an administrative determination has been based solely on criteria which the agency has specialized competence to eval-

\textsuperscript{176} Id. at 415.

\textsuperscript{177} Id.

\textsuperscript{178} See notes 99-100 supra and accompanying text.

\textsuperscript{179} 401 U.S. at 417. For an example of a delay of a highway project because a "probing, in-depth review" disclosed defects in the consideration of "relevant factors," and in "necessary procedural requirements" see Lathan v. Volpe, 350 F. Supp. 262, 263-67 (W.D. Wash. 1972).

\textsuperscript{180} 401 U.S. at 416. A conventional emphasis on the supposed narrowness of the review function is reflected in Citizens to Preserve Foster Park, Inc. v. Volpe, 3 ERC 1031 (N.D. Ind. 1971), aff'd, 466 F.2d 991 (7th Cir. 1972).

\textsuperscript{181} For an example of traditional deference to the presumption see Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613, 619 (3d Cir. 1971), citing Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935), United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926) and Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 316 (3d Cir. 1968).
It has been observed in the context of other environmental protection issues, particularly the preservation of wetlands, that the administrative actions of mission-oriented agencies, charged with the promotion of public works construction, are often determined not so much by technical considerations of a type which courts are ill-equipped to decide for themselves, as by unarticulated policy preferences. The substitution of a court's judgment for that of an administrative agency on such policy choices, particularly where the matter in question relates to an interpretation of statutory standards, is not only feasible, but often preferable. The detailed history of a section 4(f) decision in the highway program frequently suggests, if unearthed with a sufficiently "thorough, probing, in-depth review," that the key administrative decisions were based on policy considerations other than the requirements of section 4(f) as expounded in Overton Park, and were made with scant regard to applicable procedural requirements. Courts may well refrain from substituting their judgment


183. An example of FHWA's disregard of DOT's procedural requirements is disclosed in the Overton Park Administrative Record, note 101 supra.

By way of background, it should be recalled that Secretary Volpe's personal approval of the proposed highway design was necessary, for purposes of the "all possible planning" clause of section 4(f), since his responsibilities under the section had not been delegated. *See note 46 supra*. The Secretary had, furthermore, as of April 25, 1969, required that all section 4(f) matters be coordinated with the office of his Assistant Secretary for Urban Systems and Environment "TUE" [later "TEU"], note 54 supra and accompanying text. Furthermore, pursuant to FHWA's PPM 20–8, 23 C.F.R. App. A (1972), states have been required, since January 1969, to hold a "highway design public hearing" to consider the "social, economic, and environmental effects" of a proposed design, as one of the conditions which must be met before "design approval." [The PPM also requires "corridor" public hearings before "location approval," and provides for certain exceptions to the hearing requirements, not relevant to the question under discussion].

According to the Administrative Record, the design public hearing under PPM 20–8 was scheduled for May 19, 1969. On April 21, 1969, however, nearly a month before the public hearing, the Regional Federal Highway Administrator in Atlanta was advised by E.H. Swick, Deputy Director of FHWA's Bureau of Public Roads, that "[t]he proposed plan and profile of I-40 through Overton Park sent with your April 1 memorandum is satisfactory. We agree that the plan proposed by the State is the best overall solution considering both park and transportation needs." Memorandum from E.H. Swick, Deputy Director, Bureau of Public Roads, to Harry E. Stark, Regional Federal Highway Administrator, April 21, 1969.

On May 23, 1969 TUE in writing requested from FHWA a copy of the record of the May 19 design hearing as soon as it should become available, and, in addition, requested "that no decision be made on the design proposal without prior coordination with TUE, in accordance with Secretary Volpe's instruction of April 25." No answer having been received, this request was renewed by memoranda dated July 7, 1969.

On July 17, 1969, before any submission to the Secretary for his approval under section 4(f), and without any prior coordination with TUE, FHWA Adminis-
for that of the Secretary on "engineering" decisions that were really engineering decisions. At the same time they may anticipate that, more probably than not, section 4(f) administrative decisions in the highway program, particularly before the Supreme Court's *Overton Park* opinion, merit a presumption of irregularity in light of the *Overton Park* criteria.\(^\text{184}\)

Mr. Turner was, of course, told by Mr. Braman that the authorization to the Regional Administrator "is premature and should be rescinded until our respective offices have complied with Secretary Volpe's instructions," and the proposed design was subsequently submitted to the Secretary for his approval. Administrative Record, Memorandum from James D. Braman, Assistant Secretary for Environment and Urban Systems, to F.C. Turner, FHWA Administrator, July 30, 1969.

FHWA's insensitivity to environmental procedural requirements, as evidenced in this sequence, reflects a persistent resistance both to the participation of outsiders in highway planning and to the notion that the agency's discretion in roadbuilding had been significantly curtailed by section 4(f). This insensitivity, furthermore, and these attitudes, pervade the entire administration of the Federal-aid highway program during the period between the enactment of section 4(f) in 1966 and the Supreme Court's *Overton Park* decision in 1971.

Such institutional misunderstandings on the part of FHWA can be understood to be consistent to some extent with personal good faith on the part of the responsible agency personnel. FHWA, like some other engineering agencies, was not administered by lawyers, but by engineers who were reluctant to consult their lawyers except on very narrow questions, such as the drafting and enforcing of contracts. Such engineering administrators can be misled into relying excessively on their relationships with congressional committee members and staff personnel, with whom they are accustomed to working, for an understanding of the requirements imposed by the entire Congress. That the 1968 Statement of the Managers on the Part of the House [see the text accompanying note 42 supra], for instance, was not an entirely reliable interpretation of section 4(f) should not have surprised lawyers familiar with the legislative history of section 4(f); it may, however, have been completely astonishing to FHWA and state highway department engineers at the highest levels.

184. No judgment is ventured herein as to whether there has been sufficient improvement since 1971 to justify a presumption of regularity in respect of the more recent administration of section 4(f), before any 1973 delegation of authority to the operating administrations [note 55 supra]. As to post-delegation determination, obvi-
IV. Conclusions

The Supreme Court's *Overton Park* opinion, in March 1971, raised fundamental questions about whether the administration of section 4(f) had been based on a proper understanding of that provision's requirements. In order to evaluate the administration of the section in light of the Supreme Court's *Overton Park* criteria, an examination was undertaken of the files of all section 4(f) cases in the records of the Office of the Secretary of Transportation in the Spring of 1971, shortly after the Supreme Court's action. This examination, which covered the records of 123 section 4(f) cases, led to conclusions on three different levels: first, the administration of this section; second, general governmental organization for the achievement of amenity protection; and third, the organization of government for purposes of optimum resource management.

A. The Administration of Section 4(f)

It appears likely that since its effective date section 4(f) has been either ignored in scores of cases to which it applied, or has been invalidly administered by subordinate officials to whom authority was not delegated by the Secretary. The files referred to above were all submitted to OST by DOT operating agencies during a period of about 18 months beginning in the fall of 1969. Presumably a similar incidence of impacts on protected lands occurred in the preceding like period. Yet prior to the fall of 1969 only a half dozen or so cases were referred to the Secretary for section 4(f) approval. The *Overton Park* experience, indeed, provides a specific example of strenuous efforts by FHWA to keep a section 4(f) decision from the Secretary. Approvals were being requested at the time of contracting of the specific project which was to be built in the protected land. Before the enactment of section 4(f), the planning of the relevant routes was typically determined by State highway departments, with the concur-

185. This examination was undertaken in 1971 through the courtesy of the Office of the Assistant Secretary for Environment and Urban Systems; no one in that office, of course, is responsible for any of my views.

186. See note 183 *supra*, concerning the question whether the design proposed by the Tennessee State Highway Department constituted "all possible planning to minimize harm . . ." These efforts to bypass the Office of the Secretary of Transportation are particularly revealing since they involved a defense by FHWA of the State highway department's rejection of design proposals which had in effect been recommended earlier by the Secretary of Transportation on the occasion of his section 4(f) approval of the route, note 104 *supra.*
rence of BPR field personnel. It is unrealistic to imagine that any effort was made to protect parks when the routes were planned. FHWA engineers frankly disclose in conversation that until recently open space was deliberately chosen for urban highway routes, in order to minimize costs and dislocation.

Because approvals were requested only at the time of project contracting, routing options were usually limited by construction which had been completed to a point very near the protected land. The routing choices available to the Secretary may even have been narrowed by other project approvals granted by FHWA without the Secretary’s approval since the enactment of section 4(f).

Submissions made to the Secretary rarely disclosed why alternatives to a project would not be feasible or prudent, except in terms condemned by the Supreme Court as insufficient in Overton Park, namely that the alternative would involve some additional costs or disruption or both. Sometimes the costs and disruption were quantified, but before Overton Park they were almost never analyzed in light of whether or not they were “extraordinary.” The cost of the alternate route is usually compared with the cost of a park route, not with the cost of normal non-park urban construction.

The effects on protected land frequently appear trivial as described by FHWA. The submissions generally emphasized the concurrence of state and local officials in the choice of the route and there is seldom any indication of controversy. The over-all effect of such a submission could well be intimidating to a Secretary who might consider rejecting a project which lacks Overton Park-type justifications. To disapprove hundreds of highway projects throughout the country because of relatively minor uses of protected lands would understandably appear impolitic, since most of the projects are long-planned and apparently acceptable to the communities concerned. Typically the files note local impatience to complete needed roads, and the probable unpopularity of non-park alternatives often seems patent even though the alternatives would be difficult to reject in terms of the Overton Park criteria.

Unfortunately the same blandness permeates FHWA presentations of projects known to involve serious park intrusions. It would be difficult to perceive important section 4(f) difficulties from the FHWA proposals for the use of protected lands. The issues were flagged instead by the existence of controversy. Knowledge of such controversies may enter the file through the initiative of the OST staff, or through representations from other agencies, such as the Department of the Interior, the Department of Housing and Urban Development, or the Advisory Council on Historic Preservation. The problems are seldom pointed up
as a matter of course in the routine documentation from FHWA requesting the Secretary's approval under section 4(f). This difficulty is less evident in the case of section 4(f) presentations by FAA and Coast Guard.

The impression is created that highway routing decisions which were substantially conceived by BPR regional representatives before the enactment of section 4(f) have not been seriously reconsidered by the highway authorities in light of the section, and that the presentations to the Secretary are invariably justifications not to make a change. This inference is reinforced by two additional problems which tend to cast doubt on the validity of the approval process. First, it is difficult to evaluate the significance of purported approvals by municipal authorities because of possible pressure from state highway authorities for approval of the state's location, failure to do so resulting in loss of desired mileage; and second, laxity in the observation of FHWA's own environmental protection procedures suggests that such procedures are sometimes considered as window dressing rather than as essential substantive elements in the planning process. In only one or two cases have location decisions actually been reversed by the Secretary on the basis of section 4(f), and in very few other cases have projects been held up for re-studies ordered by the Secretary as a result of the section.

Section 4(f) has been noticeably effective as a spur to moderate expenditures to minimize harm to protected lands. These expenditures, which often appear to be in the nature of compromises where opponents would have preferred no parkland route at all, are occasionally suggested by the Department of the Interior or the Department of Housing and Urban Development, whose comments are requested by TEU in connection with its staffing of the proposals for the Secretary. Except for the reliance on the recommendations of these other agencies or of opponents of the project, it is difficult to sense from the administrative record whether these expenditures should be considered all possible planning to minimize harm.

187. A recent complaint, filed in Louisiana Environmental Soc'y v. Volpe in the United States District Court for the Western District of Louisiana, stated: "The City of Shreveport had no voice in planning the route of the proposed I-220 By-Pass Project, which was planned entirely by the Louisiana Department of Highways and submitted to the City of Shreveport on a 'take or leave it' basis."

188. Among the few cases of an actual route change, in addition to the Overton Park project, note 98 supra, are the cancellation of the New Orleans Riverfront Expressway, note 83 supra, and the rejection of the Goleta Slough proposal, note 64 supra and accompanying text.

189. The importance of the views of outside agencies has continued to characterize DOT's section 4(f) paperwork. For instance, on March 20, 1972, Secretary Volpe ap-
According to conversations with FHWA and OST personnel, section 4(f) is beginning to influence new routing decisions away from protected lands. At the state level, they suggest, it is becoming understood that the problems of justifying an encroachment under section

proved a project involving the construction of Interstate 75 across lands near Lake Allatoona, Georgia. This area is administered by the Corps of Engineers as part of a flood control project and is “... generally managed by the Corps of Engineers to fulfill a variety of active and passive recreation functions ... [and] wildlife management.” Reprint of Approval of United States Department of Transportation, Office of the Secretary, Use of Public Recreational Lands for I-75, at 1, March 20, 1972. The Secretary stated that DOT considers the lands “as subject to the provisions of section 4(f).” Id. He dismissed as not “feasible and prudent” a no-highway alternative and rejected as “feasible” but not “prudent” alternate locations which would avoid the section 4(f) lands entirely, because of added costs and displacements of families and businesses and “... unreasonable increase in travel distance for the Interstate traveler, particularly in view of the minimal advantage to Section 4(f) lands.” Id. at 4 (emphasis added).

Among the alternate routes which traverse the section 4(f) lands, the Secretary selected one which had the support of the National Recreation and Park Association, the Georgia Parks and Recreation Society, the Georgia Recreation Commission, the Department of Housing and Urban Development, the Environmental Protection Agency and the Department of the Interior. The Secretary treated this evidence of support for the chosen route, from among possible routes within the protected lands, as the basis for determining that “... the corridor ... meets the requirement ... for planning to minimize harm ...” Id. at 9. This determination was made subject to certain conditions for further planning to minimize harm. Some are reasonably specific, such as the requirement that all stream crossings be designated in consultation with the State Game and Fish Commission or the Corps of Engineers. Other conditions, such as that “[a]lternative construction techniques and designs ... be evaluated and a balancing of cost and environmental benefits ... be utilized in establishing the vertical and horizontal alignments and cuts and fills, with maximum attention to aesthetic considerations,” tend to perpetuate the problems discussed in the text of this article, but with some improvement in tone. Id. at 11 (emphasis added).

While the requirement for “maximum attention to aesthetic considerations” is encouraging, it is doubtful whether a “balancing of cost and environmental benefits” necessarily amounts to “all possible planning to minimize harm,” particularly if the “balancing” is to be done by FHWA. Highway agencies' benefit-cost analyses have been debatable where recreational and wilderness values are at stake, even in connection with the evaluation of purely economic considerations, without regard to the added difficulty of quantifying aesthetic values. See, e.g., Neuzil, Uses and Abuses of Highway Benefit-Cost Analysis — With Particular Reference to the Red Buffalo Route, SIERRA CLUB BULL. 19-21 Jan. 1968. An added dimension of uncertainty with regard to the application of the statutory standard is presented if the imputation of monetary values to incremental improvements in aesthetics for purposes of the prescribed “balancing” is left to FHWA's discretion. See Note, Cost-Benefit Analysis and the National Environmental Policy Act of 1969, 24 STAN. L. REV. 1092 (1972), which concludes:

The traditional model of cost-benefit analysis, with its single criterion of national income, is ill-designed to achieve proper consideration of environmental factors. A multiobjective approach, similar to that proposed by the Water Resources Council for use in evaluating federal water projects, meets many of the objections to the traditional model. However, to insure effectiveness and good faith in agency consideration of environmental factors, it will be necessary for Congress and the Council on Environmental Quality to define classification systems, priorities, and guide-
4(f) make it preferable to avoid urban open space whenever possible. This is a recent development. It is too early to judge how widespread it may be. It relates to projects which may be constructed five or more years from now, and not noticeably to those which, having been preliminarily planned in years past, are coming up for contracting over the next few years.

B. Governmental Organization for Amenity Protection

Section 4(f) has been effective to the extent that its administration has involved the intervention of staff elements other than those responsible for the programs sought to be controlled by the section. For example, a road-building agency wants to build roads. Its personnel have been educated to believe that this activity is in the public interest. The agency has traditionally been directed by Congress to work economically, that is, to minimize expenditures, consistent with constraints which it regards as relevant to transportation objectives. Its bureaucracy, moreover, looks to the Public Works Committees of Congress, not to the Government Operations Committees, for approval and future benefits. Such an organization can always persuade itself that an alternative to the use of parkland is not "feasible and prudent," particularly "prudent," if such a decision is necessary to the perpetuation of traditional roadbuilding plans and procedures.

Section 4(f) began to have some effect on highway planning only when FHWA became convinced that the Secretary seriously intended lines for federal agency officials to follow in making the important trade-off decisions involved in planning federal projects which affect the environment. Id. at 1116. For a searching critique of the cost-benefit analysis techniques of another agency (the Corps of Engineers) see Sierra Club v. Froehlke, 5 ERC 1033, 1082-95 (S.D. Tex. 1973).

There is a further objection to the Secretary's determination. Reliance on future planning, rather than on planning which is already complete, has been held to violate the requirement for all possible planning to minimize harm to such parks. In Monroe County Preservation Council v. Volpe, 4 ERC 1886 (2d Cir. 1972) the court held:

The statutory mandate is not fulfilled by vague generalities or pious and self-serving resolutions or by assuming that someone else will take care of it. The affirmative duty to minimize the damage to parkland is a condition precedent to approval for such a taking for highway purposes where federal funds are involved; and the Secretary must withhold his approval unless and until he is satisfied that there has been, in the words of the statute, 'all possible planning to minimize harm to such park . . . , and that full implementation of such planning to minimize is an obliged condition of the project.

4 ERC at 1890.

190. For a detailed discussion of the dynamics of another program in terms of organizational and structural forces rather than assumed "rational" behavior [behavior motivated by a conscious calculation of advantages] on the part of the responsible bureaucracy see Chayes, An Inquiry into the Workings of Arms Control Agreements, 85 HARV. L. REV. 905 (1972).
to review personally all decisions to which the section applies, and that he would enforce coordination of such decisions with elements of his staff in OST which were not directly involved in operational programs.

If the administration of section 4(f) had been left to the operating agencies, by delegation from the Secretary in the manner of the bulk of FHWA's statutory authority, every highway routing controversy which has led to the section's invocation would probably have been decided as if section 4(f) had never been enacted, that is, essentially in accordance with the state road commission's proposal for the use of the protected land. The need for judicial vigilance in reviewing section 4(f) highway projects is accordingly intensified in light of Secretary Brinegar's announced intention to delegate section 4(f) determinations to the operating administrations. Unless effective supervisory control is retained in the Office of the Secretary of Transportation, it seems less likely, on the basis of present experience, that FHWA will view park controversies as the courts believe Congress intended, than that responsible outsiders will do so. It is, of course, possible that FHWA may have developed enhanced insight and institutional capabilities for environmental protection since 1971. On the record, however, it would appear reasonable that the burden of persuasion rest on the agency when it approves projects using protected lands.

The participation of agencies outside DOT, such as the Interior, HUD and the Advisory Council on Historic Preservation, is also helpful. That participation is made effective, however, largely because the Secretary's staff in OST is in an independent position to emphasize the views of those agencies to the Secretary when those views are unwelcome to FHWA.

There is a need to identify environmental problems at an early stage in the planning process. It is easier to influence public works planning before fundamental decisions have been taken, than to alter those decisions once they have been made. Developments such as section 102(2)(C) of NEPA192 are of the utmost importance in helping to expose and make explicit environmental protection issues at some stage in the planning process. In order to develop these issues as early in the planning as possible, it is essential that state highway departments comply with the provisions of section 5 of PPM 20–8,193 which call for an extensive solicitation of outside views well before the hearing stage, when a state highway department begins consideration of a traffic corridor development or improvement.

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191. Note 55 supra as of May 1, 1973 no such delegation had been made.
C. The Implications For Optimum Resource Management

The conflicts between transportation uses of protected lands and environmental preservation objectives are special instances of a more general problem — the difficulty of coordinating transportation programs with other public policy land use objectives. This difficulty reflects, in part, the general absence of comprehensive land use planning in the United States. While attempts have been made to encourage planning, the results are typically fragmented. All too often transportation planning, primarily for highways, is financed independently of other planning. Instead of accommodating itself to general land use planning, the federal-aid highway program established its own pace and direction, generating parameters within which other planning must confine itself. Despite increasing criticisms\(^\text{194}\) a persistent impediment to reform is the continuation in its present form of the Highway Trust Fund, under which about $5 billion is dedicated annually to the federal-aid highway program.\(^\text{195}\) Similar problems beset other federal public works programs.

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\(^\text{195}\) 23 U.S.C. § 120 (1970); DOT Quarterly Reports on the Federal-Aid Highway Program; note 17 supra. Pursuant to the Highway Revenue Act of 1956, 23 U.S.C. § 120 (note) (1970), there is appropriated to the Highway Trust Fund amounts equivalent to certain specified percentages of the receipts from certain designated federal excise taxes, such as the taxes on diesel fuel, 26 U.S.C. § 4041(a) (1970); tread rubber, 26 U.S.C. § 4071(a)(4) (1970); gasoline, 26 U.S.C. § 4081 (1970); trucks and buses, 26 U.S.C. § 4061(a)(1) (1970); and on lubricating oil, 26 U.S.C. § 4091 (1970). Total increments to the Trust Fund were $4.69 billion in fiscal year 1969, $5.469 billion in fiscal year 1970 and $5.725 billion in fiscal year 1971. Further receipts of $5.549 billion were estimated for 1972, $5,753 billion for 1973 and $6.106 billion for 1974. Excerpt from 16th Annual Report of Highway Trust Fund, Hearings on 1972 Highway Legislation Before the Subcomm. on Roads of the House of Representatives Comm. on Public Works, 92d Cong., 2d Sess. 692-93 (1972). Funds so appropriated to the Highway Trust Fund are available for expenditure only as provided in the appropriation acts. However, because of the unusual authority in 23 U.S.C. §§ 104, 118 (1970), the amounts accumulated in the Highway Trust Fund provide a self-generating source of revenue, unavailable for other purposes, which Congress, on the recommendation of the Public Works Committees, authorizes to be obligated as well as appropriated every two years for the Federal-aid highway program [note 21 supra]. As a result, large sums are almost automatically available for the highway program, whereas the funding of other activities which should be related, such as land use planning and alternative modes of transportation, is both uncertain and far smaller.

In 1972 the Administration proposed that part of the Highway Trust Fund be available for an "Urban Transportation Program" comprising both highway systems and urban mass transportation facilities S. 3590, 92d Cong., 2d Sess. §§ 105(a)(1), 601 (1972). An attempt to open the Highway Trust Fund for non-highway mass transit expenditures along these lines, including planning, was passed by the Senate but rejected by the House, the House prevailing in conference committee. H.R. Rep. No.
Within the last two years suggestions have been made in both Congress and the executive branch for the adoption of a national land use policy. It is unlikely that such a policy would eliminate all conflicts toward which section 4(f) is directed. It might, however, be a beginning toward a planning system in which highways and other transportation facilities could be designed in a context of integrated resource management programs, illuminated by the directives of section 4(f). In such a context it might become possible to reduce the enormous burden of paperwork, the tensions of perpetual confrontation between the highway program and conservationists, the serious destructive effects of transportation public works undertakings and the probable proliferation of litigation which now characterize the implementation of section 4(f).

In the meantime section 4(f) can be an effective instrument for reopening old planning in order to obtain reconsideration of decisions made when prior attitudes prevailed as to the relative importance of the resources which the section seeks to protect. The usefulness of section 4(f) will depend in part on the skepticism which courts apply.

92-1619, 92d Cong., 2d Sess. 1 (1972). The conference committee compromise would have authorized $3 billion of "contract authority" for mass transit which, while it would not have been charged against the Trust Fund, would have permitted the executive branch to incur obligations in advance of appropriations in a manner similar to its highway financing operations under the Trust Fund. *Id.* at 46. The bill was not passed by the House, however, because of a point of order which was raised at the end of the session, [118 CONG. REC. H9294 (daily ed. Oct. 6, 1972)] and accordingly died with the adjournment of Congress. Apparently the bill failed because of Nixon Administration objections to a provision which would have made funds available not only for mass transit capital facilities, which the Administration supported, but also for the subsidy of mass transit operating expenses, which the Administration opposed. Letter to the Editor from Senator Harrison A. Williams, Jr., N.Y. Times, Nov. 16, 1972, at 44, col. 3.

It is reported that the Administration will try again in 1973:

In a discussion with his chief environmental spokesmen, the President also pledged a renewed effort to make money in the Highway Trust Fund available for mass transit systems.

'The President told us it is one of his highest priorities for Congress,' said Russell E. Train, chairman of the Council on Environmental Quality. 'He said if we didn't act on this legislation, Americans are going to spend the rest of their lives on choked-up freeways.'

Washington Post, Feb. 16, 1973, § A, at 1, col. 8

to the claims of highway-building agencies that their actions should be accorded a presumption of administrative regularity, a presumption which, in respect to the administration of section 4(f) before mid-1971, the agencies in fact do not deserve. A similar reserve is in order in respect of any administrative claims that courts should defer to an assumed expertise on the part of the administrators. As to the

197. A change is perceptible in judicial attitudes toward administrative claims. It was conventional in the 1960's to emphasize that a judge should not "substitute his judgment for that of highway officials in the selection of a route for a highway," and that the "minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges." Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179, 185 (6th Cir. 1968). It was, indeed, a generally accepted doctrine that a highway department's decision "must be allowed to stand unless it was plainly wrong." Road Review League, Town of Bedford v. Boyd, 270 F. Supp. 650, 663 (S.D.N.Y. 1967). While Overton Park repeats that "[t]he court is not empowered to substitute its judgment for that of the agency," [401 U.S. at 416], in more and more cases the courts assert the right to understand how the agency made its decision, in order to be assured that the agency acted lawfully. In NEPA cases, for instance, it was at first commonly said that the section 102(2)(C) [42 U.S.C. § 4332 (1970)] requirement for a detailed environmental impact statement is "procedural" rather than "substantive." Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749, 755 (E.D. Ark. 1971). Now federal courts of appeal say that:

District Courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA. The review is . . . for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient insight to environmental factors.

Environmental Defense Fund v. Froehlke, 4 ERC 1829, 1833 (8th Cir. 1972), quoted with approval in Conservation Council of N.C. v. Froehlke, 4 ERC 2039 (4th Cir. 1973). Similarly, in the context of the regulation of pesticides under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 74 U.S.C. §§ 135-35k (1970), which involves highly complex technical judgments, we are told:

Our own responsibility as a court is as a partner in the overall administrative process — acting with restraint, but providing supervision . . . . Environmental law marks out a domain where knowledge is hard to obtain and appraise, even in the administrative corridors; in the courtrooms, difficulties of understanding are multiplied. But there is a will in the courts to study and understand what the agency puts before us. And there is a will to respect the agency's choices if it has taken a hard look at its hard problems.

Environmental Defense Fund v. Environmental Protection Agency, 4 ERC 1523 (D.C. Cir. 1972) (emphasis added). In another FIFRA case, the same court had earlier declared:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the "substantial evidence" test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered
defense that projects with an extensive pre-1967 history should be accorded immunity from such review, the Fourth Circuit has provided a sweeping rationale in Arlington Coalition for judicial review except where it can be determined in advance that the costs of change "would certainly outweigh whatever benefits might accrue therefrom." 198

into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.

Strict adherence to that requirement is especially important now that the character of administrative litigation is changing. As a result of expanding doctrines of standing and reviewability, and new statutory causes of action, courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interest in a rate-making or licensing proceeding.

To protect these interests from administrative arbitrariness, it is necessary, but not sufficient, to insist on strict judicial scrutiny of administrative action. For judicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.

Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971). See also International Harvester Co. v. Ruckelshaus, 4 ERC 2041 (D.C. Cir. 1973). These opinions, in their willingness to analyze technical issues, albeit for the ostensible purpose of determining whether an administrative agency has applied proper criteria or exercised an appropriate methodology, suggest a kinship between the judicial function in the review of administrative decisions and the courts' traditional role as fact finder where technical disputes are involved in the litigation of common-law actions. See, e.g., Griffin v. United States, 351 F. Supp. 10 (E.D. Pa. 1972). Here the court probed in extensive detail the methods, including statistical analyses, used by the Division of Biologic Standards of the National Institutes of Health in evaluating the neurovirulence of a batch of allegedly defective Sabin polio vaccine. The court concluded that the decision of the Division to release the vaccine to the public was inconsistent with the criteria of an applicable regulation, and that the release was accordingly tortious, notwithstanding an elaborate defense by the government which claimed both immunity from suit and that the decision to release the vaccine was scientifically proper. The technical complexity of the issues did not deter the court from coming to its own conclusions as to the relationship between the test data and the requirements of the regulation: "It is true that this was a judgment requiring professional expertise, but this does not render it discretionary. This Court is fully capable of scrutinizing the processes and conclusions of the decision-maker by the usual standards applied to cases of professional negligence." Id. at 33.

198. Note 152 supra and accompanying text.